Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

v.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in reviewing the constitutionality of the punitive damages awards in this case, the Arkansas courts violated procedural due process by refusing to consider evidence presented post-verdict of defendants' financial condition establishing that the punitive damages awards would render each of the defendants insolvent?

2. Whether the remitted punitive damages award of $21 million is arbitrary and excessive in violation of due process under the constitutional analysis set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), when that analysis is properly applied to the conduct, culpability and circumstances of each separate defendant?

3. Whether the Arkansas Supreme Court's imposition of joint and several liability for the remitted punitive damages award in this case violated the constitutional requirement under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), that punitive damages awarded against a defendant be proportionate to the particular defendant's conduct and culpability, particularly since punitive damages were assessed severally against the defendants at trial?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Advocat, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock. Advocat, Inc., is the parent company and sole shareholder of both Petitioner Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Petitioner Diversicare Management Services Company.

Respondent Lon C. Sauer is an individual and administrator of the Estate of Margaretha Sauer, deceased.

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Petitioners Advocat, Inc., Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Diversicare Management Services Company (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINION BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a), to be published in S.W.3d, is currently available at 2003 WL 1996087.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered on May 1, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Background. In 1993, Mrs. Margaretha Sauer's family placed her in Rich Mountain Nursing Home in Mena, Arkansas. When Mrs. Sauer entered the nursing home, she was suffering from Alzheimer's disease, dehydration, malnutrition, bed sores, and chronic urinary tract infections. Five years later, at the age of 93, Mrs. Sauer died. At the time of her death, Mrs. Sauer was bed-bound and unable to feed herself. She died of severe electrolyte abnormalities with contributing factors of Alzheimer's type dementia and protein calorie malnutrition. Mrs. Sauer's family had considered for several weeks whether to have a feeding tube inserted into her abdomen to provide her with nutrition. Ultimately, her family authorized the procedure, but Mrs. Sauer died the day before the scheduled surgery. On her final hospital admission, her chart noted "NO CODE Blue."

Mrs. Sauer's Estate ("Plaintiff") sued the nursing home where Mrs. Sauer spent the last years of her life, which was owned and operated by Diversicare Leasing Corporation

("Diversicare Leasing"). Plaintiff also sued the nursing home's parent company, Advocat, Inc. ("Advocat"), and its management company, Diversicare Management Services Company ("Diversicare Management"). Plaintiff alleged, among other things, that Diversicare Leasing, the operator of the nursing home, did not have sufficient staff to care for Mrs. Sauer properly and to feed, bathe, and clean her adequately. Plaintiff also alleged that the nursing staff did not respond appropriately to Mrs. Sauer's failing condition in her final days.

Advocat is a public company whose subsidiaries own and operate nursing homes and other health care facilities across the country. Advocat is the sole shareholder of both Diversicare Leasing and Diversicare Management. Plaintiff claimed that Advocat failed to consider the staffing needs of Rich Mountain in setting budgets for its subsidiaries and that about a year before Mrs. Sauer died there was a shift in corporate culture to emphasize profits.

Diversicare Management employed the administrator of Rich Mountain and managed Diversicare Leasing's nursing homes on a regional basis, for which it received a fee from each nursing home. Plaintiff claimed that Diversicare Management failed to consider the staffing needs of Rich Mountain in proposing budgets to Advocat. All nursing-home care for Mrs. Sauer at Rich Mountain was provided by employees of Diversicare Leasing, not Diversicare Management.

The Trial Court Proceedings. Plaintiff brought claims for negligence, medical malpractice, breach of contract, outrage, and punitive damages under the Arkansas wrongful-death and survival statutes.[1] Before trial, the three defendants moved *in limine* to exclude all evidence of their net worth from the jury, as is required under Arkansas law in cases where punitive damages are sought against multiple defendants and a defendant requests the exclusion. *See, e.g.,*

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[1]At the time of Mrs. Sauer's death, the survival statute permitted the decedent's estate to bring claims in tort which the decedent could have prosecuted had she survived, but it did not permit an estate to sue for the decedent's loss of life. Ark. Code Ann. § 16-62-101 (Michie 1987 & Supp. 2001).

Curtis v. Partain, 614 S.W.2d 671, 674 (Ark. 1981), *overruled on other grounds by Lupo v. Lineberger*, 855 S.W.2d 293 (Ark. 1993). Pet. App. 85a-89a. The trial court granted this motion. Consistent with the trial court's *in limine* ruling, no specific evidence of Petitioners' finances was presented at trial. However, as the Arkansas Supreme Court subsequently stated, "there was information presented to the jury relating to the scope of the nursing home business controlled by Advocat," including the number of facilities (86) operated by Advocat and its subsidiaries and the number of beds (7,300), such that the jury was made aware that "Advocat oversaw a major business enterprise." Pet. App. 17a-18a.

The trial court submitted Plaintiff's claims for negligence, breach of contract, medical malpractice, and punitive damages to the jury. The court instructed the jury to decide "each defendant's case *separately* as if it were a separate lawsuit." Pet. App. 155a (emphasis added). The jury awarded Mrs. Sauer's Estate compensatory damages of $15.025 million. Pet. App. 4a, 53a-55a. The bulk of the compensatory damages, *i.e.*, approximately $14.9 million, was awarded to compensate Mrs. Sauer's pain and suffering, scars and disfigurement.[2]

In addition to the compensatory damage verdicts, the jury returned verdicts of $21 million for punitive damages against each of the defendants, Diversicare Leasing, Diversicare Management, and Advocat, for a total punitive damages award of $63 million. The trial court entered judgment severally against the three corporations on the punitive damages awards, and jointly and severally on the compensatory verdicts for negligence and medical malpractice. Pet. App. 56a-57a.

The Post-Trial Proceedings. The three defendants filed a joint post-trial motion for judgment notwithstanding the verdict or new trial, which asserted, among other things, that the awards of punitive damages were unconstitutionally exces-

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[2]The evidence at trial showed that Mrs. Sauer and her Estate had incurred only $7,708.50 in medical expenses and $6,259.06 in funeral expenses. Separately, the jury awarded $100,000 to each of the four statutory beneficiaries, who were children of Mrs. Sauer. Pet. App. 4a, 55a.

sive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Pet. App. 73a-79a, 96a-97a, 102a-103a, 109a-112a, 123a-129a, 142a-145a, 147a. The defendants also argued that the constitutional inquiry required individualized consideration of each defendant's conduct. Pet. App. 76a. In support of their constitutional excessiveness argument under *Gore*, the defendants submitted an affidavit establishing that the $21 million punitive damage awards vastly exceeded the net worth of each defendant. According to this evidence, Diversicare Leasing's net worth was $4.2 million, Diversicare Management had a negative net worth of $3.8 million, and Advocat's net worth, on a consolidated basis, was $269,679. Pet. App. 73a, 82a. The defendants also offered to present live testimony to the trial court with respect to the net worth of each defendant. Pet. App. 97a, 100a, 106a.

In response to the net worth evidence, Plaintiff contended that the constitutional review mandated by *Gore* did not require or permit review of evidence that was not before the jury. Plaintiff argued that, if the verdicts would render the corporations insolvent, they "can certainly seek the protection of bankruptcy courts." Pet. App. 142a.

The trial court held that the *de novo* standard of review for constitutional challenges to punitive damages awards did not apply to the trial court's review, but only to an appellate court's review. Pet. App. 41a. The trial court refused to consider the proffered evidence of the defendants' net worth or to conduct an evidentiary hearing as part of its post-trial review of the punitive damages under *Gore*, despite stating that "the financial conditions of the corporations would be helpful in deciding if the amount of the punitive awards should stand or be reduced." Pet. App. 41a. The trial court observed: "I just can't feel that I am supposed to conduct . . . a *de novo* review of new evidence. I just can't believe that is what I am supposed to do." Pet. App. 101a. The trial court believed that its earlier ruling under state law to exclude net worth evidence from the jury meant that it could not consider "'new' material not available to the jury" in evaluating the punitive damages awards under *Gore*. Pet. App. 41a. The trial court stated:

> While I feel the verdict is extremely large, I just do not think I can enter a substitute of my belief for that of the

> jury in this case. What basis can I give for setting a lesser amount that would not be arbitrary? If one must guess, I would feel it should be with the jury's decision. I am of the opinion that criteria one and two of the *Gore* guideposts have been met and that should be sufficient.

Pet. App. 50a-51a.

The Proceedings in the Arkansas Supreme Court. The three corporations timely appealed to the Arkansas Supreme Court. In their appeal, they argued, *inter alia*, that the punitive damages awards were unconstitutionally excessive under the three *Gore* guideposts, that the awards were unconstitutionally excessive because they far exceeded the net worth of the three defendants, and that the trial court should have considered evidence presented after trial as to each defendant's net worth. Defendants also argued that the trial court erred in not conducting a *de novo* review of the constitutionality of the punitive damages awards. *See* Abstract and Brief of Appellants at 486-91; Reply Brief of Appellants at 7-11.

The Arkansas Supreme Court affirmed the trial court's refusal to consider the proffered evidence of the defendants' net worth in its analysis of the punitive awards under *Gore*. Pet. App. 17a. The Court likewise refused to consider that evidence in its *de novo* review of the constitutionality of the punitive awards, asserting that the defendants "shut the door" on this evidence by seeking its exclusion at the trial. Pet. App. 17a. The Court ruled that there is "no procedure authorized in this state by rule or statute providing for such an evidentiary hearing under these circumstances. We decline to authorize one in the instant case." Pet. App. 17a. The Arkansas Supreme Court did not explicitly rule on the proper scope of a trial court's review of a constitutional challenge to a punitive award set by a jury. The Court, however, noted and implicitly accepted as proper the deferential standard of review applied by the trial court here. Pet. App. 5a.

In their appeal to the Arkansas Supreme Court, the defendants argued that each corporation's alleged conduct must be evaluated separately under the *Gore* guideposts. Plaintiff did not argue otherwise; indeed, Plaintiff acknowledged after trial that it did not sue on an alter ego theory but instead sought to hold each corporation liable for its own individual

conduct.[3] Pet. App. 83a-84a. Nonetheless, the Arkansas Supreme Court concluded that the three separate corporations operated as "one business" and treated them as a single entity for purposes of reviewing punitive damages. Pet. App. 14a, 21a-22a. The Court made no effort to evaluate individually the reprehensibility of each defendant's conduct toward Mrs. Sauer.

The Arkansas Supreme Court found that the $15 million compensatory damages award was excessive and should be remitted to $5 million. Pet. App. 14a. The Court also ruled that the punitive awards of $21 million against each defendant were excessive as a matter of both Arkansas and federal constitutional law. Pet. App. 25a. The Court ordered that the three separate $21 million awards be reduced to a single punitive award of $21 million, for which the three defendants would be jointly and severally liable. Pet. App. 25a. The factual and legal issues regarding the propriety of imposing joint and several liability for punitive damages had not been briefed by the parties either in the trial court or the Arkansas Supreme Court. In holding that the remitted joint and several punitive award would comply with due process limitations, the Court did not consider that even the remitted award of $21 million would render each of the defendants insolvent. The Court's opinion made clear that the punitive award, even as remitted, is by far the largest punitive award ever affirmed on appeal in Arkansas.[4]

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[3]Moreover, in granting defendants' motion to exclude evidence of wealth as prejudicial in a multiple defendant case, the trial court rejected Plaintiff's contention that Petitioners were "'multiple' defendants in name only." The trial court excluded evidence of wealth "because of the three separate corporations . . . . I did not have any evidence that these other corporations were formed to avoid judgments and so I said that the financial condition of the corporation[s] was not admissible and would probably be reversible error since there were three separate corporations. I think there was good reason for that." Pet. App. 104a.

[4]The Arkansas Supreme Court noted that "the largest award of punitive damages affirmed in this state on appeal heretofore has been $4 million." Pet. App. 25a.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to review the important issues presented by this case regarding the proper scope of trial and appellate court review of the constitutionality of punitive damage awards. These issues include (i) the constitutional concerns raised by the Arkansas courts' refusal to consider evidence, submitted post-verdict, of defendants' net worth as a factor limiting the permissible size of the punitive damage award; (ii) the Arkansas courts' failure to apply the *Gore* guideposts in individualized fashion to multiple, related corporate defendants; and (iii) the constitutional propriety of the Arkansas Supreme Court's imposition of joint and several liability for the punitive damages award. These constitutional issues, which present questions of first impression for this Court, are likely to be recurrent issues in the lower courts and merit this Court's immediate consideration.

This Court recently held that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003). This case raises the converse issue: the extent to which a defendant's lack of wealth must constitutionally be considered as a *limiting* factor in reviewing punitive damages. The trial court, in considering the defendants' post-trial constitutional challenge to the punitive awards, refused to receive evidence tendered by the defendants establishing that the punitive awards would render the defendants insolvent. The Arkansas Supreme Court affirmed the trial court's refusal to consider evidence as to defendants' financial status, and although the Arkansas Supreme Court reduced the punitive awards to a single $21 million award, that amount is still vastly in excess of defendants' ability to pay.

The refusal by the Arkansas courts to consider evidence of the defendants' financial position thwarted any meaningful review of the scope of Arkansas' interest in punishment and deterrence and the constitutionality of the punitive award in this case. A punitive award so large that it will bankrupt or impoverish a defendant does not serve the societal goals of punishment and deterrence. This principle is deeply rooted in the common law jurisprudence. Such an award is grossly excessive and contravenes due process limits on the size of a

punitive award. Because, in cases such as the present one, evidence of the defendants' financial status is critical to a correct judicial determination of the constitutionally permissible amount of punitive damages, the Arkansas courts' refusal to consider that evidence in the post-trial review process violates procedural due process. The Arkansas courts based their decision not to consider the evidence of defendants' precarious financial positions solely on the fact that defendants had made meritorious objections to the introduction at trial of that evidence as improper and unfairly prejudicial under Arkansas law. The constitutional requirement of rational punitive damages procedures does not allow the affirmance of a punitive award that would bankrupt the defendants simply because the defendants made meritorious objections to the introduction of financial evidence before the jury.

This case also presents important questions concerning the application of the *Gore* guideposts when punitive damages are awarded against more than one defendant. In this case, the Arkansas jury imposed three separate $21 million dollar punitive awards – $63 million in total – against a parent company and two subsidiaries, which (the evidence established) played very different roles in the alleged negligent care of Mrs. Sauer, a resident at a nursing home owned by one of the subsidiaries. Under the due process principles articulated in this Court's punitive damage jurisprudence, each defendant had a fundamental right to an individualized review of the constitutionality of the punitive damages award imposed against it, in particular in relation to the degree of reprehensibility of each defendant's conduct. The trial court, however, did not analyze the *Gore* guideposts separately with respect to each defendant and failed to address the arguments put forth by defendants' counsel regarding the different conduct of each defendant. The trial court's review was also vitiated by the extreme deference it showed to the jury's verdict, a deference that was incompatible with the thorough, independent examination of a punitive award mandated by this Court's decisions.

The Arkansas Supreme Court purported to review the punitive damages awards *de novo*, but (like the trial court) did not perform the constitutionally required individualized evaluation of the *Gore* guideposts with respect to each of the

three defendants. Rather, the Arkansas Supreme Court incorrectly made its own determination that the defendants should be treated as a single entity for purposes of the *Gore* analysis. Moreover, the Arkansas Supreme Court's application of the *Gore* ratio and comparable penalties guideposts suffered from additional defects, including the Court's failure to take into account the large punitive component of the compensatory damages assessed in this case and whether the purported comparable penalties were relevant to all three defendants and what the comparable penalties actually were. A thorough, independent review of the punitive damages awards pursuant to the required individualized constitutional analysis would have compelled the conclusion that a much smaller award against each defendant represented the constitutional due process limit, especially given the defendants' precarious financial positions. The punitive award even as reduced by the Arkansas Supreme Court is unquestionably grossly excessive and violates due process.

The Arkansas Supreme Court's decision to impose joint and several liability on the defendants for punitive damages also raises important constitutional questions that warrant this Court's review. The imposition of joint and several liability for punitive damages is contrary to the fundamental due process principle that a punitive damages award be proportionate to the culpable conduct and degree of reprehensibility of the particular defendant, as well as contrary to the traditional practice at common law. The Arkansas Supreme Court's *sua sponte* imposition of joint and several liability for punitive damages was even more egregious because the trial of this case was litigated by the parties on the assumption that each defendant was to be held liable only for its own conduct, and not for the conduct of the other defendants. Under these circumstances, the Arkansas Supreme Court's decision to impose joint and several liability deprived defendants of their fundamental due process right to notice and a meaningful opportunity to litigate the relevant factual and legal issues. Moreover, the Court's imposition of joint and several liability upon a parent corporation with limited involvement in the day-to-day conduct affecting Plaintiff severely erodes the principle of shareholder limited liability and threatens the ability of corporations to engage in interstate commerce. For these reasons, and those set forth be-

low, Petitioners respectfully submit this Court should grant certiorari.

I. THE ARKANSAS COURTS' REFUSAL TO CONSIDER EVIDENCE SUBMITTED POST-TRIAL TO SHOW THAT THE JURY'S PUNITIVE AWARDS FAR EXCEEDED DEFENDANTS' NET WORTH DEPRIVED DEFENDANTS OF MEANINGFUL REVIEW AND VIOLATED DUE PROCESS

This Court has held that due process mandates meaningful judicial review of punitive damages awards. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), in holding that Alabama's "common law method of assessing punitive damages did not violate procedural due process," this Court "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994) (quoting *Haslip*, 499 U.S. at 20); *see also Gore*, 517 U.S. at 587 (Breyer, J., concurring). This Court has stated that review of a punitive award by the trial court "may be even more significant" than review by an appellate court. *Oberg*, 512 U.S. at 433 n.11.

In the present case, meaningful review by both the Arkansas trial court and the Arkansas Supreme Court was short-circuited by the courts' refusal to consider evidence, proffered post-trial, of the defendants' respective financial positions, showing that the multi-million dollar punitive awards, even as remitted, were greater than the respective net worth of each of the three defendants. As a result of this refusal, the Arkansas courts affirmed a punitive award that is not rational in light of its purpose to punish what has occurred, but which rather threatens to destroy the defendants financially. The Arkansas courts' failure to consider the evidence establishing defendants' lack of financial resources violated due process.

A. A Punitive Damages Award That Is Far in Excess of a Defendant's Net Worth Serves No Legitimate Punitive or Deterrent Purpose and Is Unconstitutional

Traditional practice is the "touchstone" of due process. *Oberg*, 512 U.S. at 430; *see also Gore*, 517 U.S. at 594 (Breyer, J., concurring) (looking to "historic practice" or un-

derstanding to assess constitutionality of punitive award). The common law principle that a punitive award may not be so large as to "deprive the wrongdoer of his means of livelihood" harkens back to the Magna Carta:

> Chapter 20 of Magna Carta, 9 Hen. III, ch. 14 (1225), prohibited amercements that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood: "A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy."

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 288 (1989) (O'Connor, J., concurring in part, dissenting in part); *see also* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154-56 (1986) (Magna Carta required that a penalty should not "destroy the offender's means of making a living in his particular trade or calling," thus guaranteeing "continued productive economic viability"). Moreover, consideration of a party's ability to pay was historically an issue that became relevant and significant *after* a punitive award had been initially set by the trier of fact. As Justice O'Connor has explained, "[a]fter Magna Carta, the amount of an amercement was initially set by the court. A group of the amerced party's peers would then be assembled to reduce the amercement in accordance with the party's ability to pay." *Browning-Ferris Indus.*, 492 U.S. at 289 (O'Connor, J., concurring in part, dissenting in part).

The principle that a punitive damages award should not be so great as to impoverish or destroy a defendant financially is "deeply rooted and frequently repeated in common-law jurisprudence." *See Solem v. Helm*, 463 U.S. 277, 284 (1983). "Indeed, in its early years the common law dictated that punitive awards should not be so large as to threaten the economic viability of defendants." *Dunn v. HOVIC*, 1 F.3d 1371, 1404 (3d Cir. 1993) (Weis, J., dissenting); *see also* Jeffries, 72 Va. L. Rev. at 154 (it is an "ancient and settled principle of Anglo-American justice" "that monetary penal-

ties be limited in amount so as not to threaten the defendant's economic viability").

Courts have consistently and repeatedly held that a punitive damage award "may not be assessed in an amount which will financially destroy or bankrupt a defendant." *Liggett Group Inc. v. Engle*, No. 3D00-3400, 2003 WL 21180319, at *12 (Fla. Dist. Ct. App. May 21, 2003). "'When a punitive damage award consumes a defendant's total wealth, it has ceased to serve the societal goal of punishment.'" *Bowden v. Caldor, Inc.*, 710 A.2d 267, 278-79 (Md. 1998) (quoting *Fraidin v. Weitzman*, 611 A.2d. 1046, 1068 (Md. Ct. Spec. App. 1992)); *see also Bowden*, 710 A.2d at 278 ("The purpose of punitive damages is not to bankrupt or impoverish a defendant"); *Stroud v. Lints*, 790 N.E.2d 440, 446 (Ind. 2003) ("[a punitive] award that not only hurts but permanently cripples the defendant goes too far"); *Adams v. Murakami*, 813 P.2d 1348, 1352 (Cal. 1991) ("the purpose of punitive damages is not served by financially destroying a defendant").[5] As the Eighth Circuit has stated, "'[W]e can see neither the justice nor sense in affirming a verdict which cannot possibly be satisfied. The purpose of punitive damages is to punish [the wrongdoer] for outrageous conduct, not to drain him of his life's blood.'" *Bredberg v. Long*, 778 F.2d 1285, 1290 (8th Cir. 1985) (quoting *Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985)).

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[5] *Accord, e.g., Waits v. City of Chicago*, No. 01 C 4010, 2003 WL 21310277, at *6-7 (N.D. Ill. June 6, 2003) (reducing punitive awards that "far exceed[ed] [defendants'] ability to pay"; stating that such awards "serve no punitive purpose"); *Ibanez v. Velasco*, No. 96 C 5990, 2002 WL 731778, at *14-16 (N.D. Ill. Apr. 25, 2002) (same); *McCollum v. McDaniel*, 136 F. Supp. 2d 472, 477-78 (D. Md. 2001) (same), *aff'd*, 32 Fed. Appx. 49 (4th Cir. 2002); *Fall v. Indiana Univ. Bd. of Trs.*, 33 F. Supp. 2d 729, 747 (N.D. Ind. 1998) (a punitive award "should not be so high as to result in the financial ruin of the defendant"; an award that exceeds ability to pay is "in excess of what is reasonably necessary to punish and deter"); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 941 (D.C. 1995) ("[t]he amount of [punitive] damages should be . . . not so great as to exceed the boundaries of punishment and lead to bankruptcy"); *Dangerfield v. Star Editorial, Inc.*, No. 95-55387, 1996 WL 508675, at *3 (9th Cir. Sept. 5, 1996) (upholding trial court's refusal to award punitive damages "[g]iven that the evidence presented showed that [the defendant] operated at a net loss").

The principle that punitive damages should punish and deter, but not destroy, reflects the notions of fundamental fairness enshrined in this Court's constitutional jurisprudence. A punitive damages award that far exceeds the defendants' ability to pay serves no legitimate purpose, constitutes an arbitrary deprivation of property, and violates due process. *Campbell*, 123 S. Ct. at 1520.

B. The Arkansas Courts' Refusal to Consider Evidence of Defendants' Financial Condition Thwarted the Meaningful Review Required by Due Process

This Court's punitive damages decisions have "strongly emphasized the importance of the procedural component of the Due Process Clause" in order "to ensure that punitive damages are not imposed in an arbitrary manner." *Oberg*, 512 U.S. at 420. Due process requires "exacting" review to ensure "that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Campbell*, 123 S. Ct. at 1520-21 (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001)); *accord Oberg*, 512 U.S. at 412; *Haslip*, 499 U.S. at 20. Meaningful review is crucial to "ensur[ing] that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.'" *Haslip*, 499 U.S. at 21 (citation omitted).

In the present case, a meaningful evaluation of the punitive awards in relation to society's goals of punishment and deterrence was precluded by the Arkansas courts' refusal to consider evidence, submitted post-verdict, of the defendants' net worth. The issue of such evidence first arose before trial when the trial court granted defendants' *in limine* motion to exclude evidence of wealth based on Arkansas decisional law that recognizes that where there is more than one defendant, admission of evidence of wealth may unfairly prejudice a larger defendant, making that defendant the "target for punishment" by the jury. *See Curtis*, 614 S.W.2d at 674; *Life & Cas. Ins. Co. v. Padgett*, 407 S.W.2d 728, 730 (Ark. 1966). After the jury rendered its verdict, imposing $21 million punitive damages awards against each defendant, defendants submitted evidence of their precarious financial positions as part of their post-trial challenge to the punitive awards as

constitutionally excessive. Pet. App. 73a, 82a. The trial court refused to consider that evidence, despite acknowledging that it "fe[lt] the financial conditions of the corporations would be helpful in deciding if the amount of the punitive award should stand or be reduced." Pet App. 41a. The court stated that "the Defendants had the opportunity to submit same to the jury and chose not to do so. They now desire to furnish 'new' material not available to the jury." Pet. App. 41a.

The Arkansas Supreme Court affirmed the trial court's refusal to consider evidence of the defendants' financial condition, agreeing with the trial court that defendants had "objected to any requirement that they divulge financial information at trial," and stating that the defendants "cannot now, post-verdict, seek a remedy that they themselves shut the door to during the trial." Pet. App. 17a. The Arkansas Supreme Court further ruled that no procedure existed in Arkansas for a post-trial evidentiary hearing and declined to authorize one. Pet. App. 17a. ("We know of no procedure authorized in this state by rule or statute providing for such an evidentiary hearing under these circumstances. We decline to authorize one in the instant case").

The refusal by the Arkansas courts to consider evidence of the defendants' financial position prevented meaningful judicial review to ensure that punitive damages in this case comported with due process. The Arkansas courts' decision not to consider this evidence was based solely on the fact that defendants had made a meritorious objection to the introduction of this evidence at trial on the grounds that Arkansas state law deemed it improper and unduly prejudicial. The constitutional requirement that a punitive damages award be scrutinized *de novo* and that the excessiveness of the award be subject to reasoned review cannot be eviscerated as a result of a meritorious objection to evidence at trial. Moreover, in the present case, and cases like it, issues of a defendant's inability to pay a punitive award, and the need to present evidence on the issue, become particularly acute *after* the jury has rendered its verdict and the reviewing court is faced with determining the extent of the state's legitimate interest in punishment and deterrence.

The Arkansas courts' refusal to consider the defendants'

post-trial submission of evidence of their financial condition conflicts with the punitive damage procedures that this Court found constitutionally appropriate in *Haslip*. Under the Alabama procedures applicable in that case, evidence of a defendant's wealth is considered "'highly prejudicial and, therefore, inadmissible [during trial],'" but "is considered relevant and admissible in a post-verdict hearing on alleged excessiveness of a punitive damages award, held before the trial judge." *Ex parte Hsu*, 707 So. 2d 223, 225 (Ala. 1997) (citation omitted); *see also Haslip*, 499 U.S. at 19 ("Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law"); *id.* at 21-22 (under Alabama law, "the 'financial position' of the defendant" is among factors for judicial determination post-verdict of "whether a punitive award is reasonably related to the goals of deterrence and retribution"). This Court in *Haslip* concluded that Alabama's post-verdict review procedures "ensure[d] meaningful and adequate review by the trial court whenever a jury has fixed . . . punitive damages." *Id.* at 20.[6]

Moreover, in direct conflict with the Arkansas courts here, courts in other jurisdictions have recognized the necessity of utilizing their inherent discretion and authority to admit evidence at a post-trial hearing regarding a defendant's inability to pay a punitive award. For example, in *Zapata Martinez v. Tully*, No. CV-F 92-5236, 1994 U.S. Dist. Lexis 20935 (E.D. Cal. Sept. 23, 1994), the court considered evidence of the defendant's wealth in its post-trial review of punitive damages, despite the fact that the defendant had not presented that evidence at trial. Observing that "the trial court's review of punitive damages is considered part of the due process procedure" and that this Court in *Haslip* had "endorse[d] the trial court's consideration of a defendant's wealth in post-verdict review," the court in *Tully* concluded that consideration of the defendant's limited financial assets warranted a substantial reduction in the punitive award. *Id.*

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[6]This Court in *Haslip* noted that Alabama's procedure of deferring consideration of a defendant's financial condition until post-verdict judicial review serves another important function: it helps ensure that "the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." 499 U.S. at 22.

at *36, 40, 42-43. The court emphasized that the excessive punitive award would "be a taking of property without due process of law if such damages were imposed without judicial review." *Id.* at *42. *See also Johnson v. Ramsey County*, 424 N.W.2d 800, 807-08 (Minn. Ct. App. 1988) (trial court did not err in ordering remittitur where court, but not jury, had evidence of the defendant's ability to pay); *Mrozka v. Archdiocese*, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992) (approving trial court's consideration of evidence not presented to the jury in determining that punitive damages were excessive and "much larger than necessary to punish and deter").

C. Under the Three-Part *Mathews v. Eldridge* Balancing Test, the Arkansas Courts' Refusal to Consider Evidence of Defendants' Financial Condition Violated Due Process

The availability of procedures in states other than Arkansas for post-verdict consideration of evidence of defendants' financial condition is directly relevant to the three-part analysis that this Court set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as "'a general approach for testing challenged state procedures under a due process claim.'" *See Medina v. California*, 505 U.S. 437, 444 (1992) (citation omitted). Under this analysis, courts must consider (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the Government's interest, including the administrative burden that additional procedural requirements would impose. *Mathews*, 424 U.S. at 321.

Consideration of these three factors demonstrates that Arkansas' refusal to provide a procedure to consider post-trial the effect of a punitive award on the defendants' financial condition violates due process. The private interest at stake is enormous. *See Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting). The punitive damages award even as remitted leaves each defendant liable for up to $21 million. Moreover, where as here a punitive award exceeds a corporate defendant's net worth, not only is the defendant's property interest in the amount of money awarded at stake, but also the defendant's continued ability to run its business and its very

corporate existence may be threatened. The significance of the private interest is compounded by the "quasi-criminal" nature of a punitive award and the serious reputational injury that a defendant may suffer who is forced to pay a large punitive award. *See id.*

The risk of erroneous deprivation of that interest is extremely high. There is a substantial risk that in the absence of a post-trial procedure where a defendant may present evidence of its financial condition, defendants will be subject to punitive awards that represent an excessive percentage of their net worth. In the present case, that risk was heightened by the fact that even though specific evidence of defendants' finances was excluded, the jury was apprized of the "scope of the nursing home business controlled by Advocat," that "Advocat operated 86 facilities with 64 nursing homes with 7,300 beds," and that Advocat was listed on the New York Stock Exchange in 1996, 1997 and 1998. Pet. App. 17a-18a. Although the Arkansas Supreme Court seems to imply that the admission of such evidence was salutary (Pet. App. 17a-18a), in fact, the jury likely conjectured wrongly from that evidence that defendants' net worth was very much higher than it in fact was.

Arkansas' interest in preserving its existing scheme, whereby no provision is made for the presentation post-trial of any kind of evidence regarding punitive damages issues, is insubstantial. Indeed, other states clearly do not perceive a burden in providing for post-trial evidentiary hearings that include a presentation of evidence of the defendant's financial condition. For example, Alabama by statute requires trial courts to "receive additional evidence," including evidence of "the economic impact of the verdict on the defendant" at post-trial hearings in punitive damages cases. Ala. Code Ann. § 6-11-23(b). Similarly, Kansas by statute reserves the determination of the *amount* of punitive damages to the trial court, after a jury has held that punitive damages are warranted. *See* Kan. Stat. Ann. § 60-3702 (1994). As part of the post-verdict determination of the amount of a punitive damages award, Kansas courts consider, *inter alia*, the defendant's ability to pay. *Id.* § 60-3072(b)(6).

Moreover, courts in other states permit the post-trial submission of evidence where appropriate, even in the absence

of statutory authorization. Thus, the Texas Supreme Court has held that "[i]n a posttrial review to decide whether a punitive damages award . . . is constitutionally excessive, trial courts may consider evidence beyond what is admissible during the trial." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 52 (Tex. 1998).[7] The court explained that "[a]fter the trial, the danger of unfair prejudice, confusion of the issues, or misleading the jury no longer exists" and "the issue [of constitutional excessiveness] is then one of law." *Id.* at 52; *see also Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909-10 (W. Va. 1991) (holding that in post-trial review of punitive damages award, trial court may "adjust the award downward because of information available to him or her that would have been prejudicial to the defendant if presented to the jury"); *Collins v. Hertenstein*, 90 S.W.3d 87, 106 (Mo. Ct. App. 2002) (holding that on post-trial motion for remittitur of punitive award, trial court may consider evidence that was not admissible before jury). That other states routinely permit the introduction of evidence post-trial in punitive damages cases demonstrates that it would not be unduly burdensome to require Arkansas to do so when (as in the present case) such evidence is crucial to a reasoned review of the constitutionality of a punitive damages award.

Moreover, Arkansas has no legitimate interest in imposing a punitive award that threatens to put a defendant out of business. As discussed in Point I.A *supra*, such an award is, by definition, grossly excessive and violative of due process. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury"). Nor does Arkansas have an interest in forcing defendants to accede to the presentation of evidence to the jury that Arkansas law recognizes to be prejudicial or run the risk that an effective review will be unavailable. As the California Supreme Court stated in a similar context,

The issue is not merely a question of trial strategy. As

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[7]In *Malone*, the trial court "held a full [post-trial] evidentiary hearing" and allowed the defendant asbestos manufacturer to present evidence "about its financial condition, including evidence about previous asbestos-related punitive damage awards." 972 S.W.2d. at 44.

> our former colleague Justice Peters aptly put it, "The trial of a law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves." An award of punitive damages can be a matter of economic life or death for a defendant. The "game" theory of litigation is particularly inappropriate when the *public* interest is at stake.

Adams, 813 P.2d at 1358 (emphasis in original).

In short, the procedural infirmity in this case could be easily remedied by receiving a limited amount of evidence at a post-trial hearing. Permitting defendants to present evidence to a trial court regarding the defendants' ability to pay a punitive award is neither an onerous nor an unusual procedure. Under the *Mathews v. Eldridge* balancing test, such a procedure is required as a matter of due process. The Arkansas courts' refusal in this case to consider post-verdict evidence of the defendants' precarious financial positions violated the defendants' due process rights. This Court should grant review and clarify that evidence of a defendant's financial condition is an essential element of a proper, constitutionally sound, review of a punitive damages award.

II. THE ARKANSAS COURTS' APPLICATION OF THE *GORE* GUIDEPOSTS CONTRAVENED SUBSTANTIVE AND PROCEDURAL DUE PROCESS

This Court should also grant certiorari to review the important questions presented by this case concerning the application of the *Gore* guideposts when punitive damages are awarded against more than one defendant. In their analysis of the constitutional guideposts, the Arkansas courts failed to address the particular conduct of each defendant and simply looked at the conduct as an undifferentiated whole. The Arkansas courts' approach violated procedural due process by failing to provide any meaningful review of the punitive awards. These faulty procedures led to the affirmance by the Arkansas Supreme Court of a punitive award that even as remitted is grossly excessive as a matter of due process.

A. The Arkansas Courts Did Not Conduct the Constitutionally Required Meaningful, Individualized Review of the Punitive Damages Awards

Under the due process principles that this Court set forth in *Haslip*, *Campbell*, and *Gore*, judicial review in a multiple defendant case must include an individualized examination of the constitutionality of the punitive damages award imposed against each defendant. This Court in *Haslip* emphasized the need for a "meaningful *individualized* assessment of appropriate deterrence and retribution." 499 U.S. at 20 (emphasis added). Indeed, the focus of the constitutional punitive damages analysis, under this Court's punitive damages jurisprudence, is the evaluation of the particular conduct of the defendant towards the plaintiff. *See, e.g., Campbell*, 123 S. Ct. at 1521-22, 1524 (emphasizing the need to consider "'the degree of reprehensibility of the defendant's conduct'" and that the precise amount of a punitive award "must be based upon the facts and circumstances of the defendant's conduct") (citation omitted); *Gore*, 517 U.S. at 575 ("the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct"). This fundamental due process requirement that a punitive award must be reasonable in relation to the particular defendant's conduct toward the plaintiff is contravened if the conduct of that particular defendant is not considered individually.

In the present case, the trial court completely failed to analyze the *Gore* guideposts separately with respect to each defendant – despite the fact that the trial court instructed the jury to decide "each defendant's case separately as if each were a separate lawsuit." Pet. App. 155a; *see also infra* at 26. The trial court erred not only in its application of the substantive *Gore* standard, but also erred in declining to conduct a searching examination of the constitutional propriety of the jury's award. The trial court made clear that it did not regard the issues raised by defendants' constitutional challenge as legal issues that it was the province of the court to decide. Rather, the trial court erroneously deferred to what it termed the jury's "great discretion" in setting the amount of the punitive awards. Pet. App. 44a-45a. For example, in discussing the reprehensibility guidepost, the trial court

stated that "[t]here is no doubt in my mind that the jury considered this matter as extremely serious" and the "[j]ury must have concluded that the defendant's conduct was of such a degree as to satisfy this criteria [sic]." Pet. App. 42a. The trial court concluded that "while the Court may very well believe that the amount of the verdicts both compensatory and punitive may be excessive, it has no authority to impose its belief over the decision of the jury." Pet. App. 44a. *See also* Pet. App. 50a-51a ("While I feel the verdict is extremely large, I just do not think I can enter a substitute of my belief for that of the jury in this case. What basis can I give for setting a lesser amount that would not be arbitrary? If one must guess, I would feel it should be with the jury's decision. I am of the opinion that criteria one and two of the *Gore* guideposts have been met and that should be sufficient.").

In its decision, the Arkansas Supreme Court specifically noted and let stand the trial court's refusal to conduct *de novo* review of the punitive awards. Pet. App. 5a. That decision conflicts with this Court's decision in *Cooper Industries*, as well as with the requirements set forth for trial court review in *Oberg*. It also conflicts with the decisions of other courts, including the United States Courts of Appeals for the Eighth and Eleventh Circuits. In *Cooper Industries*, this Court held that the determination of the constitutionality of a punitive award is essentially a question of law that is to be reviewed *de novo* by appellate courts in an "independent examination of the relevant criteria." 532 U.S. at 425. It follows that a trial court also must treat that determination as an issue of law for the court, not as a matter requiring deference to the jury. In *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit explained that

> [a] constitutionally reduced [punitive damages] verdict, therefore, is really not a remittitur at all. A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is *unreasonable* on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion, a court has a mandatory duty to cor-

> rect an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Johansen, 170 F.3d at 1331. *See also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002) ("the [trial] court's mandatory review of a punitive damages award does not implicate the Seventh Amendment. The plaintiff's consent to a constitutional reduction of a punitive damages award is 'irrelevant' because the court must decide this issue as a matter of law.").

In evaluating the constitutionality of state procedures for reviewing punitive damages, this Court has "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review." *Oberg*, 512 U.S. at 420 (quoting *Haslip*, 499 U.S. at 20); *see also Gore*, 517 U.S. at 587 (Breyer, J., concurring). This Court has particularly emphasized the importance of review at the trial court level, stating that review by the trial court "may be even more significant" than appellate review. *Oberg*, 512 U.S. at 433 n.11. That essential level of review was simply missing from this case. The trial court's extreme deference to the jury improperly "reduced [it] to the status of a mere monitor" in contravention of the procedural due process requirements set forth by this Court in *Oberg*. *Id.* at 420-22.

The Arkansas Supreme Court's review did nothing to rectify the constitutional deficiency of the trial court's review. Like the trial court, the Arkansas Supreme Court also failed to consider the conduct of each defendant separately under the *Gore* factors. Rather, the Arkansas Supreme Court incorrectly determined that it was appropriate to treat the defendants – three separate corporations – as a single business. This improper determination had a controlling impact on the Court's analysis of the *Gore* factors. *See* Pet. App. 21a-26a. Moreover, even assuming *arguendo* that the Arkansas courts were not required to address the conduct of the three defendants separately, the imposition of a joint and several $21 million punitive damages award exceeds due process limits. The Arkansas Supreme Court's application of the *Gore* analysis was inadequate to serve its underlying purpose and function, namely to ensure that there existed in the evidence "at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." *Oberg*,

512 U.S. at 429.

B. Contrary to the Arkansas Courts' Conclusions, the Punitive Award in this Case Is Constitutionally Excessive under the *Gore* Guideposts and in Light of the Defendants' Inability to Pay

The deficient procedures employed by the Arkansas Supreme Court led to its affirmance of a punitive award that even as reduced to $21 million is grossly excessive. The principal reason that the award must be deemed constitutionally excessive is that the award of $21 million would render all of the defendants insolvent – a factor that the Arkansas courts refused to consider. As discussed above (*see* Point I.A *supra*), a punitive damages award that far exceeds the defendants' ability to pay serves no legitimate purpose and constitutes an arbitrary deprivation of property. This Court should grant review and make clear that punitive awards that will financially cripple a defendant cannot stand as a matter of constitutional due process.

Moreover, the Arkansas courts' analysis of the three *Gore* guideposts cannot serve to justify the punitive award in this case. The reduced punitive award of $21 million stands in a ratio of 4.2 to 1 to the remitted compensatory damages of $5 million. In approving this ratio, the Arkansas Supreme Court ignored the very substantial character of the compensatory damages, as well as the fact that the $21 million punitive award is, as an absolute figure, very high – indeed it is by far the highest punitive damages award ever upheld on appeal in Arkansas (by more than five times). In *Campbell*, this Court made clear that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 123 S. Ct. at 1524.

The Arkansas Supreme Court's ratio analysis also disregarded the fact that the $5 million compensatory award, which is almost entirely an award for pain and suffering, must be deemed to contain a large punitive element. In *Campbell*, this Court recognized that emotional distress damages contain a punitive component. *See id.* at 1524-25. As with emotional distress damages, a jury awarding damages for pain and suffering has "immediate freedom to price the

injury subjectively." Harry Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L. J. 158, 161 (1958). That subjectivity leaves the jury free to punish and condemn the defendant's conduct through its award of compensatory damages. In the present case, moreover, in light of Mrs. Sauer's condition, the jury was faced with attempting to distinguish between the very great physical and mental distress inevitably associated with terminal Alzheimer's disease and the additional distress caused by the nursing home's purported negligence in caring for her. In short, the ratio in this case is artificially low, and the $21 million punitive award cannot be justified on that basis.

The Arkansas Supreme Court concluded that "the reprehensibility of the appellants' conduct in this case was high" without distinguishing between the three corporations. Pet. App. 21a-22a. This analysis cannot stand in view of the differing conduct by the defendants. Defendant Advocat's role, for example, was principally to approve the budget submitted by Diversicare Leasing (along with the budgets of a large number of other nursing homes owned by other Advocat subsidiaries across the country). Diversicare Management provided the services of a single administrator to Diversicare Leasing. All the other employees at the nursing home where Mrs. Sauer resided were employees of Diversicare Leasing. Accordingly, the Arkansas Supreme Court's failure to evaluate the defendants' conduct separately violated the due process rights of each, and the reprehensibility analysis performed by the Court cannot support the $21 million punitive award.

The Arkansas Supreme Court found that the third *Gore* guidepost, civil sanctions for comparable misconduct, had "not been met" as to the jury's $63 million punitive awards. Pet. App. 25a. The Court further concluded that "under the three *Gore* factors, $63 million was a grossly excessive award and one that could not have been anticipated by the appellants, particularly since the largest award of punitive damages affirmed in this state on appeal heretofore has been $4 million." Pet. App. 25a. The Court, however, did not explain how the $21 million punitive award, which it imposed jointly and severally against defendants, was permissible under the *Gore* guideposts or could "have been anticipated" by

defendants. Moreover, the Court gave no explanation as to what comparable penalties would be relevant to each defendant or what the comparable penalties actually were. Nor did the Court explain what comparable penalties justified a $21 million award.

In short, the *Gore* guideposts simply cannot justify the $21 million punitive award in this case. A thorough, independent review of the punitive damages award, evaluated in light of the conduct and the precarious financial position of each defendant, would have compelled the conclusion that a much smaller award against each defendant represented the constitutional maximum.

III. THE ARKANSAS SUPREME COURT'S IMPOSITION OF JOINT AND SEVERAL LIABILITY FOR PUNITIVE DAMAGES CONTRAVENED THE DUE PROCESS PRINCIPLES SET FORTH IN THIS COURT'S PUNITIVE DAMAGES JURISPRUDENCE

The Arkansas Supreme Court's imposition of joint and several liability on the defendants for punitive damages is antithetical to the fundamental constitutional principles governing punitive damages. As this Court has made clear, those principles require that a punitive damages award be proportionate to the culpable conduct of the defendant. Joint and several liability by definition disregards the role of each particular defendant. In this case, moreover, the imposition of joint and several liability for punitive damages was procedurally deficient, because it was done *sua sponte* by the appellate court and the underlying factual and legal issues were not litigated or decided below. Defendants were thus deprived of fundamental due process rights, including notice and an opportunity to be heard and litigate such issues. This Court should grant certiorari to reverse and correct the Arkansas Supreme Court's imposition of joint and several liability in this case.

In *Campbell*, this Court reaffirmed its holding in *Gore* that the "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *Campbell*, 123 S. Ct. at 1521 (quoting *Gore*, 517 U.S. at 575). Assessment of reprehensibility un-

der this constitutional standard requires an assessment of a particular defendant's specific conduct toward the plaintiff. *See Campbell*, 123 S. Ct. at 1523-24. The imposition of joint and several liability for punitive damages by its nature is directly contrary to the constitutional mandate that punitive damages must be proportionate to the degree of a defendant's reprehensibility. *See id.* at 1521-23; *Gore*, 517 U.S. at 575-80. Thus, the Arkansas Supreme Court's decision in this case contravenes this Court's decisions in *Campbell* and *Gore* and the fundamental constitutional mandate at the heart of those decisions.

Moreover, the gravity of the constitutional violation by the Arkansas Supreme Court is underscored by the fact that the Court's decision to impose joint and several liability was *sua sponte*. The issues raised by the imposition of joint and several liability were not litigated by the parties in the trial court and were not briefed to the Arkansas Supreme Court. In fact, as the Arkansas Supreme Court implicitly recognized in its opinion, the case was tried by the parties on the opposite assumption – namely that each defendant was to be held responsible for its own conduct and not for the conduct of its co-defendants. The Arkansas Supreme Court upheld the jury instructions given in this case on the grounds that the trial court "took pains to instruct the jury that each appellant was entitled to a fair consideration of 'his own defense.'" Pet. App. 34a. The jury instructions stated that each defendant:

> is entitled to a fair consideration of his own defense and is not to be adversely affected by your findings with respect to the other. . . . You will decide each defendant's case separately as if each were a separate lawsuit.

Pet. App. 155a. Moreover, in response to the defendants' post-trial motions, Plaintiff specifically disavowed an alter ego theory of punitive damages, asserting that it had tried the case based upon theories of direct liability against each of the three defendant corporations. Pet. App. 83a-84a.

Nonetheless, the Arkansas Supreme Court "conclud[ed] that the three appellants did operate Rich Mountain as one business." Pet. App. 14a. In such circumstances, the imposition of joint and several liability by an appellate court unconstitutionally deprived defendants of notice and a meaningful

opportunity to litigate factual and legal issues raised by the imposition of joint and several liability. *See, e.g., Tomaselli v. Transamerica Ins. Co.*, 31 Cal. Rptr. 2d 433, 442 (Ct. App. 1994) ("Since it appears alter ego had *not* been an issue litigated or decided below, the appellate determination of this peculiarly factual issue appears to have been *de novo*, in apparent disregard of fundamental rules of due process (i.e., notice and opportunity to litigate the alter ego question) and in violation of the prohibition agains fact finding on appeal when the parties have not waived a jury below;" overturning punitive award based upon wealth of parent).

The Kansas Supreme Court in *Smith v. Printup*, 866 P.2d 985 (Kan. 1993), has rejected the imposition of joint and several liability for punitive damages. Although the Kansas Court was applying state common law, its analysis is relevant to the constitutional principles set forth by this Court governing punitive damages awards:

> The imposition of joint and several liability for punitive damages is contrary to the purpose for which punitive damages are awarded. Punitive damages are awarded to punish the wrongdoer. Each wrongdoer is liable to pay the punitive damages assessed against him or her. The amount of the award is to be calculated with the individual defendant's financial status and conduct in mind. Joint and several liability undermines these considerations and therefore is unavailable. *Id.* at 1011.

The Kansas Supreme Court's decision is in accord with the majority rule on punitive damages against joint tortfeasors. *See* Dan B. Dobbs, *Remedies* § 3.9, at 215-16 (1973). It is "well settled that, although compensatory damages among joint tortfeasors cannot be apportioned, a jury may apportion punitive damages among joint tortfeasors in various amounts according to their individual culpability."[8] *Chiu v. Wadsworth*, No. A097626, 2003 WL 150095, at *17 (Cal. Ct.

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[8]In some states, joint and several liability for punitive damages is barred by statute. *See, e.g.*, N.J. Stat. Ann. 2A:15-5.13e (West 2000); Wis. Stat. Ann. § 895.85(5) (West Supp. 2002). Arkansas just this year enacted a statute barring joint and several liability for punitive damages (which does not apply retroactively to this case). *See* Civil Justice Reform Act of 2003, Arkansas Acts 649, § 1(a).

App. Jan. 22, 2003) (quoting *Thomson v. Catalina*, 271 P. 198, 200 (Cal. 1928) ("[J]uries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense.")); *Owens-Illinois v. Armstrong*, 591 A.2d 544, 559 (Md. Ct. Spec. App. 1991) ("punitive damages are assessed against a defendant individually based on the degree of culpability or the existence of malice on the part of each defendant and thus are not held as a joint and several liability by joint tortfeasers"), *aff'd in relevant part*, 604 A.2d 47, 57 (Md. 1992) ("[p]unitive damages, in essence, represent a civil fine, and as such, should be imposed on an individual basis"); *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 374 (2d Cir. 1988) ("imposition of joint liability for a punitive damage award is improper"); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984) ("punitive damages, like criminal fines, which they resemble, are always assessed individually").

The fact that the defendants in this case are related corporations does not alter the analysis. In the absence of evidence establishing that corporations are alter egos, courts have repeatedly declined to hold one corporation liable for punitive damages awarded against another. *See, e.g., Dangerfield*, 1996 WL 508675, at *3-4 (upholding district court's denial of plaintiff's motion for new trial and motion for leave to amend complaint to assert alter ego theory of liability for punitive damages, where alter ego argument was made only on appeal); *A.L. Labs., Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 385 (8th Cir. 1986) (upholding district court's decision setting aside punitive damages against parent corporation, where plaintiffs had not presented sufficient evidence to justify disregarding corporate forms and treating parent and wholly owned subsidiary as one entity).

The imposition of joint and several liability against a related group of corporations (such as defendants here) is contrary to the "bedrock principle" of corporate law, "deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (citation omitted). "Thus, it is hornbook law that 'the

exercise of the control' which stock ownership gives to stockholders . . . will not create liability beyond the assets of the subsidiary." *Id.* (citation omitted). The erosion of shareholder limited liability, whether through imposition of joint and several liability (as in this case) or otherwise, has a constitutional dimension because it threatens the ability of corporations to engage in interstate commerce. Indeed, the comparison has been made between local discrimination against out-of-state enterprises through regulation that is forbidden by the Commerce Clause, and the punitive exactions imposed by "local juries and local courts [that] naturally will favor local plaintiffs over out-of-state (often faceless, publicly held) corporations when awarding punitive damages." *Garnes*, 413 S.E.2d at 906; *see also id.* ("Inevitably, this race [to the bottom] (whether in taxation or damages awards) leads to increasing efforts to redistribute wealth from without the state to within.").

The Arkansas Supreme Court's imposition of joint and several liability on the out-of-state parent corporations, if followed in other jurisdictions, will have a significant detrimental effect on the federal, economic and democratic goals that are protected by shareholder limited liability. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 n.3 (5th Cir. 1997). *See also* Stephen B. Presser, *Piercing the Corporate Veil* § 1.01, at 1-3 (West 2003) (the "venerable doctrine [of shareholder limited liability] is crumbling, and with its disintegration has come perhaps the greatest danger to American enterprise and the law which is supposed to promote it"). This Court should grant certiorari to address the important constitutional issues raised by the Arkansas Supreme Court's imposition of joint and several liability for punitive damages in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF ARKANSAS DELIVERED MAY 1, 2003

ADVOCAT, Inc.; Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center; and Diversicare Management Services Co., Appellants,

vs.

LON C. SAUER, Individually, And As Administrator Of The Estate Of Margaretha Sauer, Deceased, And On Behalf Of The Wrongful Death Beneficiaries Of Margaretha Sauer, Appellee,

No. 02-189

APPEAL FROM THE POLK COUNTY CIRCUIT COURT,
NO. CIV-2000-5,
HON. GAYLE K. FORD, JUDGE,

AFFIRMED ON CONDITION OF REMITTITUR.

ROBERT L. BROWN, Associate Justice

Appellants Advocat, Inc.; Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center (Rich Mountain); and Diversicare Management Services Co. appeal various aspects of a total judgment amount of $78,425,000 in favor of appellee Lon C. Sauer, individually, and as Administrator of the Estate of Margaretha Sauer and on behalf of the wrongful death beneficiaries of Margaretha Sauer (Sauer Estate). Advocat raises multiple points on appeal: (1) the compensatory and punitive damages are grossly excessive and were motivated by passion and prejudice; (2) the punitive-damages verdicts should be reversed due to insufficient evidence, violation of federal constitutional standards, and excessiveness under Arkansas law; (3) the trial court erred in not excluding surveys from the State's Office of Long Term Care; (4) there was insufficient evidence of liability against Advocat and Diversicare Management to support a finding of negligence or medical malpractice; (5) the verdict forms erroneously permitted the jury to duplicate damages; and (6) the

trial court erred in submitting inherently erroneous, binding instructions to the jury. We hold that the circuit court abused its discretion in failing to grant a new trial on excessive damages or, alternatively, to order a remittitur. We affirm the judgment on condition of remittitur.

Facts

On July 19, 1998, Margaretha Sauer died at the Mena Medical Center following a five and one-half year stay at Rich Mountain. She was 93 years old. Mrs. Sauer's discharge summary revealed that the cause of her death was severe electrolyte abnormalities, with contributing factors of "Alzheimer's type, dementia[,]" and protein calorie malnutrition.

The events leading up to Mrs. Sauer's death are these. She had been scheduled for the insertion of a gastro-intestinal feeding tube into her stomach on July 6, 1998, but the surgery was delayed due to the doctor's unavailability. On July 18, 1998, at 8:00 a.m., a nursing note reveals that Mrs. Sauer refused her medication. Her vital signs then began to decline. On July 19, 1998, at 3:30 a.m., her vital signs were still declining, and, according to the nursing staff, she was not "acting right." At 5:00 a.m. that same morning, the nursing staff reported the developments to Dr. David Brown, her treating physician, who ordered that she be taken to the emergency room at the Mena Medical Center. She arrived at the hospital in a semi-comatose condition. She died about sixteen hours later on that same date.

Mrs. Sauer's physical condition at time of death was gleaned from nursing notes. She had lost fifteen pounds in the last month and was in need of a feeding tube. There were signs of bedsores on her body, stemming from lying in urine and excrement. She suffered from contractures from Alzheimer's Disease, which involved contraction of her limbs into her sockets. She also had a urinary infection and had been experiencing a foul vaginal discharge.

On January 12, 2000, the Sauer Estate filed a complaint against the appellants, and included as well Diversicare Corporation of America - Arkansas, and Diversicare Corporation of America as parties defendant.[1] According to the complaint, Advocat was a Pennsylvania corporation and the parent company. Advocat owned eighty-six facilities in the southeast and Canada, sixty-four of which were nursing homes. Diversicare Leasing Corporation was an Arkansas corporation that did business as Rich Mountain Nursing and Rehabilitation Center. Diversicare Management Services Co. was a Tennessee corporation that held the permit for Rich Mountain to operate in the state. The complaint alleged several counts against the named defendants, including negligence, negligence *per se*, tort of outrage, breach of contract, and wrongful death. The complaint prayed for damages for medical expenses and costs, mental anguish, funeral expenses, and for Mrs. Sauer's pain and suffering prior to her death, as well as general and special damages, the costs of litigation, and punitive damages. A first amended complaint filed later dropped the negligence *per se* count and added a new count for medical malpractice.

The appellants generally denied the complaint and asserted affirmative defenses, including failure to allege facts sufficient to state a claim, failure to comply with Ark. R. Civ. P. 9(b) relating to allegations of fraud, negligence of others, pre-existing condition, failure to mitigate, entitlement to set-off from any recovery, no proximate causation, and statute of limitations, among others. On June 13, 2001, the trial began and lasted eight days. Twenty-eight witnesses testified, and there were twenty-four binders of exhibits. At the trial's conclusion, the jury retired to consider four counts: ordinary negligence, medical malpractice, breach of contract, and

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[1] Diversicare Corporation of America – Arkansas and Diversicare Corporation of America were voluntarily dismissed from the litigation by the Sauer Estate.

wrongful death. The jury returned a verdict for the Sauer Estate on all counts submitted. It awarded compensatory damages of $5 million for ordinary negligence, $10 million for medical malpractice, $25,000 for breach of contract, and $100,000 for each of the surviving beneficiaries for wrongful death. The total judgment against the three appellants for compensatory damages was $15,400,000, with joint and several liability. An award of $25,000 was also entered separately against Diversicare Leasing Corporation for breach of contract. Punitive damages in the amount of $21 million were awarded separately against each of the three appellants, without joint and several liability, for a total punitive damage award of $63 million. Combined judgments totaling $78,425,000 were memorialized by order of the court.

On July 9, 2001, the appellants filed their motion for judgment notwithstanding the verdict and remittitur, or, in the alternative, for a new trial. A hearing was held on the motion, and on August 3, 2001, the circuit court issued a letter opinion in which it denied the motion. The court said that it was "unable to state that the evidence produced during this 9 day trial was insubstantial and that the jury's decision should be set aside." The court further wrote:

> With respect to the Defendant's contentions in its Motion for JNOV or in the alternative a new trial, these have been previously ruled upon and I am convinced that those rulings should stand. As I mentioned at the conclusion of the hearing on the Defendant's present motion, the jury was presented with evidence that these three companies were operated as one company.

Dep. of Mary Margaret Hamlett at p. 23.

The court concluded:

> While the Court may very well believe that the amount of the verdicts both compensatory and punitive may be excessive, it has no authority to impose its belief over the decision of the jury. . . . However, a belief by a trial court that damages are excessive is not, standing alone, a sufficient ground for ordering a reduction because if that were the standard, the great discretion of the jury would be abrogated.

The court termed the verdict "very large" but said it was "at a loss as to how I can substitute my opinion for that of the jury. Obviously the jury must have concluded that Mrs. Sauer suffered from pain and suffering." As a final point, the court reiterated: "While I feel the verdict is extremely large, I just do not think I can enter a substitute of my belief for that of the jury in this case."

Regarding remittitur, the court ruled that *de novo* review was not its standard of review but was for the appellate court. The court further found that while the financial information of the appellant corporations would have been helpful in deciding whether the award for punitive damages should stand or be reduced, the appellants had the opportunity to submit the same information to the jury and chose not to do so. The court also discussed the criteria set out by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), relating to whether the size of the punitive-damage award violated the appellants' right to due process, but deferred to the jury and found no violation of the appellants' due process rights. On the same day as the letter opinion, an order was entered denying appellants' motion for judgment notwithstanding the verdict, remittitur, and new trial.

I. Excessive Compensatory Damages

The appellants first argue that the damage awards for negligence and medical malpractice are grossly excessive. In

support of their position, the appellants assert that the only elements of damage at issue were past medical expenses, conscious pain and suffering, scars and disfigurement, and contract damages. Moreover, they maintain that Mrs. Sauer had no dependents, was unemployed, and had a life expectancy of two years at the time of her death. She had been at Rich Mountain for five and one-half years but was now crippled by Alzheimer's disease and bed-bound.

With respect to pain and suffering, they contend that evidence of such is scarce in the record. They further maintain that the introduction of two Office of Long Term Care surveys, admitted over their objection, inflamed the jury, because the surveys were "replete with statements that there was not enough help in the nursing home to feed, bathe, or clean residents." Additionally, appellants submit that testimony by witnesses that the nursing home had engaged in "false-charting" to show more staff than were actually present was prejudicial, because it suggested the appellants had staffing inadequacies that they tried to conceal from the State.

The appellants also point to the prejudicial testimony of Faye Chamberlain, a former nurse assistant at the home, who wrote to then-President Clinton in 1997 about the nursing home's inadequacies, and the testimony of Mark Hemingway, a former regional vice-president of Diversicare Management, who testified to a change in corporate philosophy in 1996 to stressing profits over care. There was, too, they assert, the prejudicial testimony of a former chief financial officer, Mary Margaret Hamlett, who testified that all three separate appellants were run as one company. The appellants conclude that all of this testimony combined incited the jury to give the largest personal-injury verdict ever awarded in Arkansas and inflamed the jury, not because of Mrs. Sauer's injuries, but because of problems in the nursing home industry as a whole. They add that there was no basis for the jury's award of $5 million for negligence or $10 million for medical malpractice, when Mrs. Sauer's actual

medical bills totaled little more than $7,700. Indeed, they contend that in a recent case this court reversed an award of $100,000 for pain and suffering to the estate of a sixty-six year old woman who died after waiting thirteen hours for a consultation with a surgeon. See *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002).

The appellants further assert that the Sauer Estate is urging the wrong standard of review and that the correct standard is *de novo* review. They contend that the jury awarded the appellee $14,992,291.50 (total compensatory damages less actual medical damages) for pain and suffering associated with pressure sores, contractures, oral hygiene, and lack of food or drink that occurred only during the last 24 to 48 hours of Mrs. Sauer's life. They claim that the Sauer Estate grossly exaggerated the number and severity of Mrs. Sauer's pressure sores and that her contractures and poor oral hygiene do not support such an award for pain and suffering; nor, they urge, was there evidence that Mrs. Sauer's vaginal discharge caused her any pain and suffering. As for her lack of food and water, the appellants contend that had the family permitted a feeding tube earlier, she would have lived.

We, initially, are of the opinion that the Sauer Estate correctly states our standard of review. Where an award of damages is alleged to be excessive, this court reviews the proof and all reasonable inferences most favorably to the appellee and determines whether the verdict is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the trier of fact. See *Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997). Remittitur is appropriate when the compensatory damages awarded are excessive and cannot be sustained by the evidence. See *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999). The standard of review in such a case is that appropriate for a new trial motion, *i.e.*, whether there is substantial evidence to support the verdict. See *Johnson v. Gilliland*, 320 Ark. 1, 896 S.W.2d 856 (1995) (citing Ark. R.

Civ. P. 59(a)(5) (stating a new trial may be granted on the ground that there was error in the assessment of the amount of recovery, whether too large or too small)). Moreover, Arkansas Rule of Civil Procedure 59(a)(4) provides as one ground for a new trial "excessive damages appearing to have been given under the influence of passion or prejudice." Here, Mrs. Sauer died in the care of Rich Mountain from severe malnutrition and dehydration. There was evidence presented that she was found at times with dried feces under her fingernails from scratching herself while lying in her own excrement. At other times, she was not "gotten up" out of her bed as she should have been. Often times, Ms. Sauer's food tray was found in her room, untouched because there was no staff member at the nursing home available to feed her. She was not provided with "range of motion" assistance when the facility was short of staff. On one occasion, her son complained to staff that he had found his mother at 3:00 p.m., still in her gown, wet with urine, disturbed, and upset.

Testimony further revealed that at times, there was not enough hot water with which patients could shower. Mrs. Sauer was often times found wet without being changed in four hours. She had pressure sores on her back, lower buttock, and arms on days she was found sitting in urine and excrement. A former staff member remembered seeing Mrs. Sauer at one time with a pressure sore the size of a softball, which was open. Her sores and blisters became infected. She was frequently double-padded, and even triple-padded, rather than single-padded for her incontinence problems. At times, she had no water pitcher in her room; nor did she receive a bath for a week or longer, due to there not being enough staff at the facility. She was described as "always thirsty" and her nursing notes indicated that she was heard moaning and crying. At the time she was hospitalized prior to her death, she had a severe vaginal infection. When she was in the geriatric chair, she was not "let loose" every two hours, as required by law. Finally, Mrs. Sauer was found to

suffer from poor oral hygiene with caked food and debris in her mouth.

We hold that the jury verdicts were not based on passion or prejudice. There was ample testimony and evidence presented to demonstrate that Mrs. Sauer suffered considerably and was not properly cared for, that Rich Mountain was short-staffed, and that the appellants tried to cover this up by "false-charting" and by bringing in additional "employees" on state-inspection days. Mr. Hemingway testified that these deficiencies were due to a shift in corporate philosophy that placed profits over proper patient care. All of this serves to support the Sauer Estate's case that the nursing home, under the auspices of the appellants, knew it had staffing problems and committed negligence as to Mrs. Sauer, because it was short-staffed due to cutbacks.

The second question for this court to resolve is whether the verdict for compensatory damages was so great as to shock the conscience of the court.[2] This court has held that there is no definite and satisfactory rule to measure compensation for pain and suffering; the amount of damages must depend on the circumstances of each particular case. See *McElroy v. Benefield*, 299 Ark. 112, 771 S.W.2d 274 (1989). Additionally, we have held that compensation for pain and suffering must be left to the sound discretion of the jury and the conclusion reached by it should not be disturbed unless the award is clearly excessive. *See id.* In this regard, we have observed that where the jury's award is not segmented, it is difficult for this court to surmise what the basis for the jury award was, apart from medical expenses. See *West Union v. Vostatek*, 302 Ark. 219, 788 S.W.2d 952 (1990).

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[2] The appellants note in their reply brief that they do not take issue with the jury's award of $25,000 awarded for breach of contract and $100,000 awarded to each of Mrs. Sauer's four sons for her wrongful death. Accordingly, there is no need for this court to address those verdicts.

The evidence in this case certainly reflects that Mrs. Sauer's estate was entitled to damages for pain and suffering in connection with both negligence and medical malpractice. The question is, in what amount?

At the post-trial hearing on excessive damages, the appellants argued that the compensatory damages award should be reduced to $50,000 in accordance with newly-enacted Act 1621 of 2001, which establishes the public policy of this state. The amended code section now provides:

> (a)(1) The State of Arkansas and the Attorney General may institute a civil action against any long-term care facility caregiver necessary to enforce any provision of this chapter.
>
> (2) Notwithstanding any criminal penalties assessed under this chapter, any caregiver against whom any civil judgment is entered as the result of a civil action brought by the State of Arkansas through the Attorney General on a complaint alleging that caregiver to have abused, neglected, or exploited an endangered or impaired adult in a long-term care facility required to be licensed under §§ 20-10-224 shall be subject to pay a civil penalty:
>
> (A) Not to exceed ten thousand dollars ($10,000) for each violation judicially found to have occurred; or
>
> (B) Not to exceed fifty thousand dollars ($50,000) for the death of an adult in a long-term care facility which results from a single violation.
>
> (3)(A) The State of Arkansas and the Attorney General shall not be precluded from recovering civil penalties under subdivision (a)(2)(A) of

this section for the death of an adult which results from multiple violations.

(B) However, the State of Arkansas and the Attorney General shall be prohibited from recovering civil penalties under both subdivisions (a)(2)(A) and (B) of this section.

(b) In any action brought pursuant to this section, the State of Arkansas shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(c) Any penalty shall be paid into the Treasury of the State of Arkansas and credited to the Arkansas Medicaid Program Trust Fund.

(d) Any caregiver against whom any civil judgment is entered as the result of a civil action brought or threatened to be brought under this section by the State of Arkansas through the Attorney General shall be required to pay to the Attorney General all reasonable expenses which the court determines have been necessarily incurred in the enforcement of this chapter.

Ark. Code Ann. § 5-28-106 (Supp. 2001).

The Sauer Estate urges that the jury award of $15 million, virtually all of which is due to pain and suffering, cannot be reduced. It points to the Arkansas Constitution which reads that the "right of trial by jury shall remain inviolate[.]" Ark. Const. art. 2, § 7. At oral argument, counsel for the Sauer Estate opined that even if the compensatory damages for pain and suffering had been $100 million against each appellant corporation, it would still have been unassailable as excessive. We disagree. We further disagree that the circuit judge had no discretion in reducing an excessive jury verdict.

One treatise on damages has described the jury's dilemma inherent in any pain-and-suffering evaluation:

> Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for them must be left to the judgment of the jury, subject only to correction by the courts for abuse and passionate exercise. One of the most difficult decisions facing the jury in a personal injury case is the size of the monetary award for pain and suffering, since there is no objective method of evaluating such damages. The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he or she is entitled, in reasonable consideration of the pain and suffering necessarily endured or to be endured. The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed.

2 Stein on Personal Injury Damages, § 8:8, at 8-19 (3d ed. 1997) (footnotes omitted). *See also Howard Brill, Arkansas Law of Damages*, § 29-2, pp. 551-52 (4th ed. 2002).

Appellate courts have an equally difficult time in reviewing awards for pain and suffering. The same treatise concludes: "When appeals courts do overturn an award, they are generally expected to provide an amount a 'reasonable person would

estimate as fair compensation.'" *2 Stein on Personal Injury Damages*, § 8:8, at 8-54 (3d ed. 1997) (citing *Restatement (Second) of Torts* § 912 cmt. b (1979)).

Our rules and case law make it clear that it is incumbent upon the courts to determine whether a jury award is clearly excessive. *See* Ark. R. Civ. P. 59(a)(4)-(5); *McElroy v. Benefield, supra*. The remedy for an excessive-damages award is for the court to grant a remittitur. *See, e.g., United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998). This remedy dates back to 1841 in our case law. *See Fulton v. Hunt*, 3 Ark. 280 (1841). Remittitur can be applied to compensatory damages as well as to punitive damages. *See, e.g., Johnson v. Gilliland, supra*; *Shepherd v. Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987).

Remittitur has been used by this court in the past on numerous occasions. *See, e.g., Johnson v. Gilliland, supra* (holding that evidence supported a remittitur of $10,000 from $20,250 in gross negligence action); *Fisher Trucking, Inc. v. Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991) (holding remittitur of $317,078.28 from $1,000,000 for breach of lease); *Scheptmann v. Thorn*, 272 Ark. 70, 612 S.W.2d 291 (1981) (affirming on condition of remittitur of $25,000 from $50,000 for loss of consortium); *Anheuser-Busch, Inc. v. McAlpin*, 262 Ark. 907, 562 S.W.2d 72 (1978) (holding verdict was highly speculative and warranted remittitur reducing $10,000 award to $3,000 on claim for damages from drinking a bottle of beer containing a foreign substance); *Browder v. Gahr*, 258 Ark. 992, 530 S.W.2d 359 (1975) (reducing judgment from $30,000 to $20,000 in personal injury action); *Scott v. Jansson*, 257 Ark. 410, 516 S.W.2d 589 (1974) (reducing award for loss of consortium from $25,000 to $10,000); *Arkansas State Highway Comm'n v. Bradford*, 252 Ark. 1037, 482 S.W.2d 107 (1972) (holding actual damages were only $24,878 and ordering remittitur from $26,500 in action to take land); *Duty v. Gunter*, 234 Ark. 176, 350 S.W.2d 908 (1961) (holding award of $7,500

was excessive and should be reduced to $3,500 in action for damages stemming from automobile collision); *Union Motor Co. v. Turbiville*, 223 Ark. 92, 264 S.W.2d 592 (1954) (reducing award of $800 to $647.18 in an action for damages for misrepresentation); *Daniels v. Allen*, 206 Ark. 1155, 178 S.W.2d 853 (1944) (reducing judgment from $20,000 to $10,000 for personal injuries).

We hold that while the compensatory damages awarded in this case were not the result of passion or prejudice, they do shock the conscience of this court.

Nevertheless, the issue still remains: What is an appropriate measure for reduction? Again, virtually all of the damages awarded were for pain and suffering. The jury awarded $5 million for negligence and $10 million for medical malpractice, with the three appellant corporations to be held jointly and severally liable. No doubt the jury focused on Mrs. Sauer's age and medical condition at the time of her death, the extent of her misery, and the absence of care she received for the period leading up to her death. Testimony by the Sauer Estate's witness, Mary Margaret Hamlett, was clear, though, that the three appellants operated Rich Mountain as one business. This court concludes that the three appellants did operate Rich Mountain as one business, which the circuit court acknowledged in its comments from the bench. We further hold that the circuit court abused its discretion in not granting a new trial based on excessive damages or by ordering a remittitur of damages. Though we are cognizant of the fact that separate verdict forms were returned for each appellant on negligence and medical malpractice, we are persuaded that a reasonable basis for remittitur is to reduce the negligence and medical malpractice awards by two-thirds. We grant the remittitur and reduce the total damage award for negligence and medical malpractice from $15 million to $5 million, with joint and several liability. We affirm the judgment award on condition of remittitur as stated at the conclusion of this opinion.

II. Excessive Punitive Damages

Appellants next argue that the evidence was insufficient to support an award of punitive damages in that although the testimony presented may have been evidence of negligence, it was not evidence of conscious or reckless disregard of known or probable consequences, from which malice can be inferred, as required for an award of punitive damages under state law. Appellants further contend that the punitive-damage awards are an unlawful taking and violate their due process rights under the United States Constitution under the holding of the United States Supreme Court in *BMW of North America, Inc. v. Gore*, *supra*.

a. Insufficient Evidence

Appellants' first argument that there was insufficient evidence to support the award of punitive damages in this case is not preserved for this court's review. Arkansas Rule of Civil Procedure 50(e) requires that where "there has been a trial by jury, the failure of a party to move for a directed verdict at the conclusion of all the evidence, because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict." We conclude that "at the conclusion of the evidence" means exactly that--when all the evidence is in.

In the criminal context, this court has held that a defendant must renew a motion for directed verdict following any rebuttal testimony put on by the State in order to preserve a sufficiency-of-the-evidence argument under Ark. R. Crim. P. 33.1. *See, e.g., Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002). In *Grady*, this court cited Ark. R. Crim. P. 33.1 and held "the close of all the evidence," occurred after the State's rebuttal testimony, and that the defendant's failure to renew his motion for directed verdict following the State's rebuttal proof precluded appellate review. The same reasoning applies here. The evidence was not concluded until the Sauer Estate had put on its rebuttal

testimony to the appellants' defense. Accordingly, the "conclusion of all the evidence" occurred after the Sauer Estate's rebuttal evidence. See Ark. R. Civ. P. 50(e). Because the appellants failed to renew their motion for directed verdict following the conclusion of the Sauer Estate's rebuttal, they waived any question pertaining to the sufficiency of the evidence to support the jury's award of punitive damages.

b. Arkansas Common Law

The appellants contend that the punitive damages are excessive under Arkansas law and, in addition, violate their due process rights under *BMW of North America, Inc. v. Gore, supra*. In 1998, this court set out a compendium of Arkansas law related to remittitur and punitive damages:

> When considering the issue of remittitur of punitive damages, we review the issue *de novo*. *See Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). We consider the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. *See United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998); *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Punitive damages are a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another. *See United Ins. Co., supra*. When punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees, and we determine whether the verdict is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the trier of fact. *See Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997); *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). It is important that the punitive damages be sufficient to deter others from comparable conduct in the future. *See McLaughlin v. Cox, supra*.

Routh Wrecker Service v. Washington, 335 Ark. 232, 240-241, 980 S.W.2d 240, 244 (1998). The conscious indifference of the alleged wrongdoer to the wrong committed is a pertinent factor in assessing punitive damages. *See United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998).

We begin by observing that the extent and the enormity of the wrong done to Mrs. Sauer are considerable. As already emphasized in this opinion, there was evidence that the appellants knew Rich Mountain was short-staffed, including surveys by the Office of Long Term Care, but took no measures to rectify the situation. Indeed, there were attempts to disguise this fact. Also, the Advocat business enterprise appears to be sizeable. The appellants make much of the fact that they were precluded from offering financial information at a post-trial hearing. But we agree with the circuit court that the appellants could not have it both ways. The appellants first objected to any requirement that they divulge financial information at trial. The circuit court sustained the objection. They cannot now, post-verdict, seek a remedy that they themselves shut the door to during the trial. The circuit court correctly disallowed the request. The same holds true of the appellants' passionate argument in favor of a post-verdict excessiveness hearing to introduce financial information they objected to at trial. We know of no procedure authorized in this state by rule or statute providing for such an evidentiary hearing under these circumstances. We decline to authorize one in the instant case.

Although the appellants argue that the circuit court erred in not allowing them to place additional financial information into evidence post-trial for the consideration of whether the punitive damages were excessive or to conduct a post-trial excessiveness hearing for that same purpose, there was information presented to the jury relating to the scope of the nursing home business controlled by Advocat, albeit specific financial numbers were not introduced. Mary Margaret Hamlett, who served as Chief Financial Officer for Advocat, Inc. from May 10, 1994, until

June 30, 1999, testified by video deposition that the leasehold interest of the Rich Mountain Nursing Home was owned by Diversicare Leasing Corp. and the management of the home was conducted by Diversicare Management Services. Her diagram of the corporate structure, from memory, was that the parent corporation was Advocat, Inc., which had two subsidiaries, Diversicare Management Services Co., and Diversicare Leasing Corp., d/b/a Rich Mountain. Rich Mountain was part of Diversicare Leasing Corp. and was managed by Diversicare Management Services. From the company's perspective, these three corporations were operated as one business, according to Ms. Hamlett. She stated that during the relevant time period, the company had in the vicinity of 11,000 beds, including Canadian operations and North Carolina assisted living operations. In addition, Ms. Hamlett testified that according to an Advocat news release, Advocat operated 86 facilities with 64 nursing homes with 7,300 beds in the southeast and Canada. Advocat was also listed on the New York Stock Exchange in 1996, 1997, and 1998, according to Ms. Hamlett. From this testimony, it appears that Advocat oversaw a major business enterprise.

Viewing all of the pertinent evidence together, we conclude that punitive damages were indeed appropriate in this case. The question, however, as was the case with compensatory damages, is the amount of those damages. We conclude that an award of $63 million in punitive damages shocks the conscience of this court as a civil penalty. We will consider what remittitur is appropriate after an analysis under *BMW of North America, Inc. v. Gore, supra*. Again, what impacts this court is that the three appellants operated Rich Mountain as one business.

c. Due Process Violations

We turn next to the appellants' contention that their due process rights were violated under *BMW of North America, Inc. v. Gore, supra*, because they had no prior notice that an award

of this magnitude could be entered against them as a penalty in Arkansas. In the *Gore* case, the issue was whether BMW failed to disclose to the buyer of a new BMW automobile that the car had been repainted. The jury awarded the buyer compensatory damages of $4,000 and punitive damages of $4 million. The Alabama Supreme Court reduced the punitive damage award to $2 million. The United States Supreme Court reversed that award of punitive damages. The Court said in its analysis that "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to [the State's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. at 568. In order to make this determination, the Court added that it is necessary for the courts to examine the scope of the State's legitimate interest in punishing the defendant and deterring future misconduct. However, a State may not impose its own policy choice on neighboring states. *See id.* Accordingly, the Court concluded that a State may not "impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572.

In order to determine whether an award of punitive damages is grossly excessive and runs afoul of due process under *Gore*, the Court provided three criteria to be used to determine whether a tortfeasor received adequate notice of both the conduct that would subject him to punishment and the magnitude of the sanction a State might impose: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damages award; and (3) the difference between this remedy and the civil penalties authorized by statute or imposed in comparable cases. *See* id. This court has employed the *Gore* analysis in at least two previous cases. *See Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Routh Wrecker Serv., Inc. v. Washington, supra* (both using the *Gore* factors to

analyze whether punitive damages were grossly excessive and violated due process).

A *Gore* analysis is performed in the appellate court by using a *de novo* review. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Most recently, the United States Supreme Court emphasized that punitive damages pose an acute danger of arbitrary deprivation of property. *See State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. ___ (April 7, 2003). In that case, one person was killed and another permanently injured in a car accident caused by Campbell. State Farm, the liability carrier for Campbell, refused to settle the matter for the $50,000 policy limits. The case went to trial, and the jury verdict was three times the policy limits. State Farm did not appeal. Campbell sued State Farm for bad faith, fraud, and outrage. Ultimately, the jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the damages verdict to $1 million compensatory and $25 million punitive, but the Utah Supreme Court reinstated the original verdict.

The United States Supreme Court held that the $145 million in punitive damages was neither reasonable nor proportionate to the wrong committed and constituted an irrational and arbitrary deprivation of State Farm's property. In holding as it did, the Court used the *Gore* criteria and emphasized that the case had improperly been used as a platform to punish State Farm for its perceived deficiencies throughout the country regarding hypothetical nonparties. The Court noted also that there was scant evidence that State Farm had engaged in repeated misconduct of the sort that damaged the Campbells. We will proceed to discuss the *Gore* criteria. Though the Sauer Estate's counsel disputed this at oral argument, we conclude that the three *Gore* criteria must be given equal weight.

(i) Degree of Reprehensibility

As to the first criterion, the Court said that "exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'" *Gore*, 517 U.S. at 575. Accordingly, the Court held in that case (1) where the harm inflicted by the tortfeasor was "purely economic in nature[,]" (2) there was no evidence that the tortfeasor had acted in bad faith, (3) there was no evidence that the tortfeasor had "persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions[,]" and (4) the record failed to disclose any "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," the tortfeasor's conduct was not sufficiently reprehensible to warrant the imposition of a $2 million award. *Id.* at 576-80.

In *State Farm Mut. Ins. Co. v. Campbell, supra*, the Court elaborated on factors for consideration when assessing reprehensibility: "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at ___.

In the case at hand, the harm inflicted by the appellants was not purely economic in nature. Mrs. Sauer suffered, and there was considerable evidence introduced that budgetary constraints contributed to a diminished staff and inadequate supplies. In addition, the appellants knew by virtue of the surveys by the Office of Long Term Care that they were understaffed with nurses at Rich Mountain and that this directly related to patient care. This understaffing continued even after complaints by staff members, patients, and family members. Furthermore, the record in this case reveals deliberate false entries on patient charts and efforts to conceal this evidence. We have no

hesitancy in concluding that the reprehensibility of the appellants' conduct in this case was high.

(ii) Ratio

In *Gore*, the Court noted that its prior decisions had endorsed "the proposition that a comparison between the compensatory award and the punitive award is significant." 517 U.S. at 581. The Court further noted its rejection of the idea that the "constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Id.* at 582 (emphasis in original). The Court concluded that in most instances, the ratio will be within a constitutionally acceptable range. *See id.* at 583. However, where the ratio is "breathtaking," the award will surely "raise a suspicious eyebrow." *Id.*

In the instant case, the jury awarded the Sauer Estate compensatory damages of $15,000,000 for negligence and medical malpractice. We have already concluded that these damages shock the conscience of this court and that a remittitur to $5 million is appropriate. As the jury awards approved by the circuit court stand, the $63 million in punitive damages is roughly 4.2 times the amount of the compensatory damages, as originally determined by the jury. As noted in *Gore*: "In [*Pacific Mut. Life Ins. Co. v.*] *Haslip* [499 U.S. 1 (1991)] we concluded that even though a punitive damages award of 'more than 4 times the amount of compensatory damages' might be `close to the line,' it did not 'cross the line into the area of constitutional impropriety.'" 517 U.S. at 581. Most recently, the Court has held that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, . . . or, . . . of 145 to 1." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at ___.

We cannot say that the ratio of punitive damages to compensatory damages, which is 4.2, is "breathtaking" in the instant case.

(iii) Civil Sanctions for Misconduct and Comparable Cases

The final factor adopted by the United States Supreme Court in *Gore* for adequate notice is that of comparing the punitive damages award to the civil or criminal penalties that could be imposed for similar misconduct. In this case, the punitive damages award is substantially greater than the statutory penalties set forth in the Arkansas Code. As set out above, Ark. Code Ann. § 5-28-106 (Supp. 2001), authorizes the State of Arkansas to pursue a civil action against any long-term care facility for neglect of its patients. *See* Ark. Code Ann. § 5-28-106(a)(1). Notwithstanding any criminal penalties available under the chapter, any caregiver against whom a judgment is entered as a result of a civil action brought by the State for neglect or abuse of an endangered or impaired adult shall be subject to a civil penalty of not more than $10,000 for each violation judicially found to have occurred or not more than $50,000 for the death of an adult resulting from a single violation.[3] *See* Ark. Code Ann. § 5-28-106(a)(2). In the instant case, the record does not reveal a specific number of civil violations committed against Mrs. Sauer. The same can also be said for criminal penalties. Our Criminal Code sets forth the criminal penalties for adult abuse. *See* Arkansas Code Annotated § 5-28-103 (Repl. 1997). For neglect, the statute authorizes the following criminal sanction:

> (c)(1) Any person or caregiver who neglects an endangered or impaired adult in violation of the provisions of this chapter, causing serious

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[3] For purposes of the chapter, adult residents of long-term facilities are presumed to be impaired adults. *See* Ark. Code Ann. § 5-28-101(7)(B)(Supp.2001).

> physical injury or substantial risk of death, shall be guilty of a Class D felony and shall be punished as provided by law.
>
> (2) Any person or caregiver who neglects an endangered or impaired adult in violation of the provisions of this chapter, causing physical injury, shall be guilty of a Class B misdemeanor and shall be punished as provided by law.

Ark. Code Ann. § 5-28-103(c) (Repl. 1997). Both civil and criminal penalties are assessed based upon specific violations of abuse, neglect, or exploitation. *See* Ark. Code Ann. §§ 5-28-103, 5-28-106. Neglect is defined under the Criminal Code as follows:

> (8) "Neglect" means acts or omissions by an endangered adult; for example, self-neglect or intentional acts or omissions by a caregiver responsible for the care and supervision of an endangered or impaired adult constituting:
>
> (A) Negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult;
>
> (B) Negligently failing to report health problems or changes in health problems or changes in the health condition of an endangered or impaired adult to the appropriate medical personnel; or
>
> (C) Negligently failing to carry out a prescribed treatment plan[.]

Ark. Code Ann. § 5-28-101(8) (Supp. 2001).

Appellants claim that it ludicrous to conclude that Mrs. Sauer suffered 6,300 violations under the subchapter to substantiate a punitive-damages award of $63 million.

However, it appears from the definition of the term "neglect" that it is impossible to know how many violations might have occurred; nor have the appellants suggested a more appropriate number. Moreover, the jury verdicts from other jurisdictions cited in the circuit court's letter opinion do not inform this court about whether those cases were ultimately settled or appealed and affirmed.

The highest punitive-damages award affirmed by this court is $3 million. *See Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982). The highest punitive damage award affirmed by our court of appeals on appeal is $4 million. *See Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. ___, 98 S.W.3d 48 (2003). We conclude, as we did with compensatory damages, that the punitive damages awarded, while not the result of passion or prejudice, shock the conscience of this court. They are far and away in excess of any other punitive-damages award in this state which, while not the determinative factor, is instructive. Under our analysis, the third criterion in *Gore* has not been met.

We hold that the circuit court abused its discretion in not granting a new trial due to excessive punitive-damages awards or, alternatively, in failing to grant a remittitur. We further hold that under Arkansas law and under the three *Gore* factors, $63 million was a grossly excessive award and one that could not have been anticipated by the appellants, particularly since the largest award of punitive damages affirmed in this state on appeal heretofore has been $4 million. We grant the remittitur and reduce the amount of the total punitive damages awarded by two-thirds to $21 million, and provide for joint and several liability. We do so on the basis that this is reasonable under our *de novo* review. We conclude that one business is involved in the management of Rich Mountain and that it shocks the conscience of this court to award the same amount of punitive damages against the parent company and the two subsidiary

companies. We will affirm the judgment only on condition of remittitur as stated in the conclusion of this opinion.

III. Long Term Care Surveys

Appellants next argue that the circuit court erred in admitting into evidence two redacted State of Arkansas Office of Long Term Care (OLTC) surveys, one from January 1997 and one from May 1998. Appellants assert the surveys contained unsubstantiated complaints about the care of residents other than Mrs. Sauer and findings by the OLTC that Rich Mountain had violated certain Medicare reimbursement regulations. They contend that evidence of the treatment of other patients is not relevant to Mrs. Sauer's care. They further contend that the circuit court abused its discretion under Arkansas Rules of Evidence 402 and 403 by admitting the irrelevant and prejudicial evidence.

Relevant evidence is that evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* Ark. R. Evid. 401. All relevant evidence is admissible, while irrelevant evidence is not. *See* Ark. R. Evid. 402. Although evidence may be relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See* Ark. R. Evid. 403. This court has held that the trial court has broad discretion in decisions of admissibility, and we will not reverse its ruling absent an abuse of this discretion. *See National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1990).

We believe that the surveys completed by the OLTC in January 1997 and May 1998 were relevant to the instant case. The Sauer Estate put on substantial evidence of ways in which Mrs. Sauer suffered while a resident at Rich Mountain, much of

which centered on inadequate staff and nursing care available to Mrs. Sauer. Any evidence having a tendency to make these allegations more or less probable would be relevant. Clearly, the OLTC's findings that Rich Mountain was not meeting OLTC's requirements regarding adequate nursing staff were relevant as to whether the Sauer Estate's allegations of lack of patient care were true. In the January 1997 survey, OLTC made the following conclusion, which it supported by several findings:

> Based on observation, record review, and interview, the facility failed to provide adequate nursing staff for 13 of 13 residents on the case mix assistance to feed at mealtime, turn and reposition, provide incontinent care, serve food and obtain treatment orders, serve meals in a timely manner, and get residents up in chairs at mealtimes.

A similar conclusion was reached by OLTC in its May 1998 survey:

> Based on observations, record review and interview, the facility failed to provide sufficient nursing staff to provide nursing and related services necessary to provide quality care for 21 of 21 case mix residents.

Each OLTC survey notified appellants of examples of the manner in which Rich Mountain failed to meet the needs of its patients due to inadequate staffing. Whether the patients at Rich Mountain suffered from inadequate nurse staffing pertaining to personal hygiene, feeding, and treatment would certainly have a bearing on whether the allegations made by the Sauer Estate about the lack of quality care afforded to Mrs. Sauer were more or less probable. Moreover, the surveys are probative of the fact that the appellants were on notice of dangerous conditions in the nursing home due to understaffing. *See Ex parte McCullough*,

747 So. 2d 887 (Ala. 1999)(superseded in part by amendment to statute dealing with prohibition of discovery for other acts or omissions); *Montgomery Healthcare Facility Inc. v. Ballard*, 565 So. 2d 221 (Ala. 1990) (superseded in part by enactment of statute dealing with prohibition of discovery for other acts or omissions). *Cf. Berry v. St. Paul Fire and Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997) (affirming trial court's finding that survey letters were irrelevant to issue of decedent's type of care but if plaintiff laid a foundation tying deficiencies to death, may be admissible; plaintiff failed to do so). Because the OLTC surveys were relevant, they were admissible unless their probative value was substantially outweighed by the danger of unfair prejudice or they would mislead the jury.

The mere fact that evidence is prejudicial to a party is not, in itself, a reason to exclude it. *See Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994). The danger of unfair prejudice must substantially outweigh the probative value of the evidence. *See id.* The probative value of the OLTC surveys was great. Not only did the surveys show that Rich Mountain was understaffed during the relevant time period, but they also served as evidence that Rich Mountain was put on notice of its failure to address adequacy-of-staff issues in 1997. Although the surveys undoubtedly were prejudicial to appellants, that prejudice did not outweigh the strong probative value of the surveys. We affirm the circuit court on this point.

IV. Insufficient Evidence of Liability

For their next point, the appellants argue that the evidence was insufficient to prove negligence or medical malpractice against either Diversicare Management or Advocat, and as a result, the circuit court should have granted their motion for judgment notwithstanding the verdict. Appellants further contend that the Sauer Estate failed to prove that each entity "took some action that proximately caused Mrs. Sauer damage." Additionally, the appellants claim that the Sauer Estate failed to

show that the administrator of Rich Mountain played any part in the care of Mrs. Sauer; nor was there any evidence that Advocat or any of its employees failed to act in the care of Mrs. Sauer. Further, as to medical malpractice, the appellants contend that neither of the Sauer Estate's expert witnesses testified to any knowledge of the local standard of care governing claims for medical injuries as required under the Medical Malpractice Act or that Dr. Leonard Williams testified to any opinion with a reasonable degree of medical certainty.

We conclude that appellants' arguments are not preserved for this court's review. As already referenced in this opinion, Ark. R. Civ. P. 50(e) requires that where there has been a trial by jury, a party's failure to move for a directed verdict "at the conclusion of all the evidence" constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the jury's verdict. Here, appellants concede that although they renewed their motion for directed verdict at the close of the Sauer Estate's case-in-chief, and after putting on their own evidence, they failed to do so following the estate's rebuttal witness. Hence, this court is precluded from reviewing their allegations of insufficiency of the evidence as to liability.

V. Duplicate Damages

The appellants next argue that, over their objection, the circuit court submitted six separate verdict forms to the jury, four of which forms contained special interrogatories for each of the three appellants relating to negligence, medical malpractice, breach of contract, and wrongful death. Indeed, the appellants point out that they submitted a general verdict form, as an alternative for consideration by the jury, and it was rejected. The appellants assert that the jury did not know how to segregate damages for the different legal theories and that, as a consequence, its verdicts for negligence and medical malpractice awarded duplicative recoveries for the same injuries. They contend that the jury did not know that Arkansas

law prohibits multiple recoveries for the same injuries. They further maintain that the verdict forms asked the jury to assess damages on each separate claim without considering whether the awards were duplicative. The appellants contend that the circuit court should have recognized the risk of double recovery when the defense objected to "submitting multiple verdict forms for multiple remedies."

We initially observe that this issue of duplication involves only the compensatory damages and not the punitive damages, as the objection made by appellants related only to "multiple theories" for relief which resulted in the compensatory damages. Secondly, we have some question about whether the appellants preserved this issue for the court's review due to an insufficient record. Although the abstract does not reflect a ruling on the appellants' objection to the multiple verdict forms, the record does reflect that the trial court ruled, stating "Same ruling." This court, of course, can go to the record to affirm. *See Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995). In the context presented, it appears that the "same ruling" was to deny the objection to multiple verdict forms for multiple parties.

We disagree, nevertheless, that the verdict forms were confusing to the jury. The following forms were given to the jury and completed as indicated:

> VERDICT FORM: COUNT I - ORDINARY NEGLIGENCE
>
> Do you find from a preponderance of the evidence that there was negligence on the part of Advocat, Inc. that was the cause of the damages or injuries sustained by Margaretha Sauer?
>
> X Yes ___ No
>
> Do you find from a preponderance of the evidence that there was negligence on the part of Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and

Rehabilitation Center that was the cause of the damages or injuries sustained by Margaretha Sauer?

X Yes ___ No

Do you find from a preponderance of the evidence that there was negligence on the part of Diversicare Management Services Co. that was the cause of the damages or injuries sustained by Margaretha Sauer?

X Yes ___ No

If you answered "yes" to any of the above questions, please proceed:

On the claim for ordinary negligence, we, the jury award damages as follows:

Estate of Margaretha Sauer : $5 million

VERDICT FORM: COUNT II - MEDICAL MALPRACTICE

Do you find from a preponderance of the evidence that Advocat, Inc. failed to use reasonable care in treating Margaretha Sauer with the degree of skill and learning ordinarily possessed and used by nursing home facilities in the same or similar locality, which was the proximate cause of any damages to Margaretha Sauer?

X Yes ___ No

Do you find from a preponderance of the evidence that Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center failed to use reasonable care in treating Margaretha Sauer with the degree of skill and learning ordinarily possessed and used by nursing home facilities in the same or similar locality, which was the proximate cause of any damages to Margaretha Sauer?

X Yes ___ No

Do you find from a preponderance of the evidence that Diversicare Management Services Co. failed to use reasonable care in treating Margaretha Sauer with the degree of skill and learning ordinarily possessed and used by nursing home facilities in the same or similar locality, which was the proximate cause of any damages to Margaretha Sauer?

X Yes ___ No

If you answered "yes" to any of the above questions, please proceed:

On the claim for Medical Malpractice, we, the jury award damages as follows:

Estate of Margaretha Sauer: $10 million

Turning to the merits, we have already held in this opinion that the three appellants operated Rich Mountain as one business for purposes of gauging excessive compensatory damages and that the jury's $15 million award for pain and suffering associated with negligence and medical malpractice shocked the conscience of this court. We ordered remittitur of the award by two-thirds and confirmed the imposition of joint and several liability. However, we do not view that holding in the context of excessive damages as dispositive of the issue of duplicative damages. The appellants argue that the jury was confused and because of that confusion awarded double or even triple recovery to the Sauer Estate. Rather than confusing, the verdict forms appear to delineate the claims for relief and the parties. If there was confusion, it was in not distinguishing ordinary negligence from medical malpractice. However, the record does not reflect any attempt by the appellants to offer a clarifying instruction on this point. Under the circumstances, we cannot say the circuit court abused its discretion in instructing the jury as it did.

VI. Inherently Erroneous and Binding Instructions

The appellants further argue that the circuit court submitted inherently erroneous instructions to the jury by instructing the jury that it should find against all three appellants even if only one of the three appellants committed the tortious conduct and by directing the jury to impose liability against all three appellants for the actions of one. In addition, the appellants contend that the instructions were erroneous because the circuit court modified model jury instruction AMI 205 to include the "verdict-directing final bracketed paragraph of AMI 205 even though the case was submitted on interrogatories." The appellants note that although they did not specifically object to these instructions on the precise ground that they were inherently erroneous and binding instructions, they made general objections against submitting the negligence, medical malpractice, and wrongful death instructions. They submit that under Arkansas caselaw, a general objection is all that is necessary to attack the validity of an inherently erroneous, binding instruction on appeal. Regarding AMI 205, they submit that it was the independent duty of the circuit court to give the instructions as written and set forth in the model jury instructions unless particular circumstances require a modification. Here, they argue that the circumstances did not.

An inherently erroneous instruction is one that could not be correct under any circumstance. *See Koch v. Missouri Pac. R.R. Co.*, 248 Ark. 1251, 455 S.W.2d 858 (1970). Where an instruction is inherently erroneous, a general objection to it will suffice. *See Missouri Valley Bridge & Iron Co. v. Malone*, 153 Ark. 454, 240 S.W. 719 (1922). This court has held that an erroneous instruction, which is likely to mislead the jury, is prejudicial. *See Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996). However, although the court will presume prejudice from the giving of an erroneous instruction, the error may be rendered harmless by other factors in the case. *See id.*

In the instant case, the appellants take issue with the following instruction:

> [In proving negligence, t]he Estate of Margaretha Sauer . . . has the burden of proving each of three essential propositions: . . . Second, that Advocat, Inc.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; and Diversicare Management Services Co. or one of them failed to use reasonable care in providing custodial nursing home care to Margaretha Sauer.

The appellants also take issue with similar wording in the instructions for medical malpractice and wrongful death.

We disagree that this instruction is incorrect under any circumstance and, thus, we conclude it is not inherently erroneous. Clearly, the jury could find that all three appellants, or only one of them, failed to use reasonable care. Presumably, the jury could also find that two of the three appellants failed to do so. Regardless, if the appellee proved that one, two, or even all three of the appellants failed to use reasonable care, that the Sauer Estate sustained damages, and that such negligence was a proximate cause of the damages, it was proper for the jury to enter a verdict in favor of the estate. That is a correct statement of the law.

Moreover, the circuit court took pains to instruct the jury that each appellant was entitled to a fair consideration of "his own defense:"

> Although there is more than one defendant in this action, it does not follow from that fact alone that if one is at fault, both are at fault. Each is entitled to a fair consideration of his own defense and is not to be adversely affected by your findings with respect to the other. The instructions and the evidence govern the case as to each defendant, insofar as they are applicable to

him. To the same effect as if he were the only defendant in the action. You will decide each defendant's case separately as if each were a separate lawsuit.

Thus, the verdict forms further demonstrate that the jury was to consider each appellant on its own accord. For example, *Verdict Form: Count I - Ordinary Negligence* provided:

> Do you find from a preponderance of the evidence that there was negligence on the part of Advocat, Inc. that was the cause of the damages or injuries sustained by Margaretha Sauer?
>
> _____ Yes _____ No
>
> Do you find from a preponderance of the evidence that there was negligence on the part of Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center that was the cause of the damages or injuries sustained by Margaretha Sauer?
>
> _____ Yes _____ No
>
> Do you find from a preponderance of the evidence that there was negligence on the part of Diversicare Management Services Co. that was the cause of the damages or injuries sustained by Margaretha Sauer?
>
> _____ Yes _____ No
>
> If you answered "yes" to any of the above questions, please proceed:
>
> On the claim for ordinary negligence, we, the jury, award damages as follows:
>
> Estate of Margaretha Sauer: $_____

We conclude that when the instructions are read as a whole, the jury could not have been misled. *See e.g., Arkansas Louisiana Gas Co. v. McGaughey, Bros., Inc.*, 250 Ark. 1083,

468 S.W.2d 754 (1971). The instructions were not inherently erroneous.

This court has also discussed in detail when an instruction is binding:

> This instruction, reasons appellant, is *binding* because it concludes with the phrase "your verdict must be for the defendant," and is erroneous because it required the jury to find for appellee if any negligence on the part of appellant was shown, irrespective of whether such negligence caused or contributed to appellant's injury.
>
> . . . .
>
> The concluding phrase "you will find for the plaintiff" or "you will find for the defendant" is the mark of a binding instruction. *Reynolds v. Ashabranner*, 212 Ark. 718, 207 S.W.2d 304; and where a binding instruction given which ignores an essential issue on which evidence conflicts, reversible error is committed, even though a separate instruction correctly defines such issue. *Vaughan v. Herring*, 195 Ark. 639, 113 S.W.2d 512.
>
> The rule has been applied where an instruction purports to recite conditions under which recovery should be granted or denied, but requires the jury to find for a particular party without mention of such controverted affirmative defenses as assumption of risk, (*Garrison Company v. Lawson*, 171 Ark. 1122, 287 S.W. 396), contributory negligence, (*Natural Gas & Fuel Co. v. Lyles*), 174 Ark. 146, 294 S.W. 395), adverse possession, (*Bayles v. Daugherty*, 77 Ark. 201, 91 S.W. 304), and others.

The purpose of instructions is to inform the jury of the legal principles applicable to the facts presented, and furnish a guide to assist in reaching a verdict. They are

> *ordinarily read to the jury with continuity and unless contradictory as a matter of law must be considered as a whole. If, when so considered, the legal issues presented are properly explained, no prejudice results. St. Louis I. M. & S. Railroad Co. v. Rogers*, 93 Ark. 564, 126 S.W. 375, 1199.
>
> Tested by this standard, the present charge is sufficient.

Hearn v. East Texas Motor Freight Lines, 219 Ark. 297, 298-300, 241 S.W.2d 259, 260-61 (1951) (emphasis added). The same holds true in the case at hand. When the instructions are read as a whole, we hold that they are not binding.

The appellants, finally, take issue with the fact that the trial court included the "verdict-directing final bracketed paragraph of AMI 205 even though the case was submitted on interrogatories." That bracketed paragraph reads: "If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for [the claiming party](against the party or parties found to be liable); but if, on the other hand, you find from the evidence that any of the propositions has not been proved, then your verdict should be for [party being sued]." The *Notes on Use* to AMI Civ. 4th 205 state that the final bracketed paragraph should not be used when the case is submitted on interrogatories. The instant case, of course, was submitted on interrogatories.

We disagree with the appellants that giving the bracketed part of AMI 205 rendered the instruction inherently erroneous under all circumstances. Thus, a general objection does not suffice. Rather, this is a situation where counsel for the appellants should have specifically objected to the error. He did not. This court has made it clear: "In order to preserve the issue for appellate review, when objecting to the giving of an erroneous instruction, one must make a timely and specific objection to the instruction the trial court intends to give; when

objecting to the trial court's failure to give an instruction, the objector must offer an alternative instruction which he or she believes to be the correct statement of the law." *Acme Brick Co. v. Missouri Pac. R.R. Co.*, 307 Ark. 363, 366-67, 821 S.W.2d 7, 9 (1991) (citation omitted). This issue of AMI 205 is not preserved for our review.

VII. Conclusion

We hold that the circuit court abused its discretion by not granting a new trial due to excessive damages under Ark. R. Civ. P. 59(a)(4) and (5). If, within eighteen days, the Sauer Estate remits $10 million of the $15 million compensatory damages, leaving a compensatory damage award of $5 million, with joint and several liability, and further remits $42 million of the $63 million punitive damages, leaving a punitive damages award of $21 million, also with joint and several liability, the judgment will be affirmed. Otherwise, the case will be reversed, and the cause will be remanded for a new trial. *See Fisher Trucking, Inc. v. Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991).

Affirmed on condition of remittitur.

CORBIN, J., not participating.

OPINION LETTER FROM THE HONORABLE GAYLE FORD, JUDGE FILED AUGUST 3, 2001

IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS

Mr. Brian Reddick
Attorney At Law
425 W. Capitol, Suite 3500
Little Rock, AR 72201

Mr. Darren O'Quinn
Attorney At Law
425 W. Capitol, Suite 3700
Little Rock, AR 72201

Re: Sauer v. Advocat, Inc., et al
Polk Circuit CIV-2000-5

Gentlemen:

On the 9th day of July, 2001, the Defendants filed their Motion for a Judgment Notwithstanding the Verdict and Remittitur or in the Alternative, a Motion for New Trial. A hearing was held on Friday, July 27, 2001.

I am convinced that the Defendant's Motion for JNOV or New Trial must be denied.

The Arkansas Supreme Court in *Schmidt v. Pearson, Evans and Chadwick*, 326 Ark. 799 (1999) said, "In reviewing this matter on appeal, we are guided by the rule that a trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict of the jury and the moving party is entitled to judgment as a matter of law. *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Page 504. Furthermore, a trial court may not substitute its view for that of the jury, and the jury's verdict must be clearly against the preponderance of the evidence in order to be set aside. The

standard regarding a motion for a new trial is the same. See Ark. R. Civ. P. 50(b). Also, on appeal, this court views the evidence and all reasonable inferences therefrom in the light most favorable to the party for whom the original judgment was entered. *McLaughlin*, 324 Ark. at 368."

Also see *St. Edward Mercy Medical Center v. Ellison*, 58 Ark. App. 100, (1997), "Appellate review of a denial of a motion for a directed verdict or judgment notwithstanding the verdict entails determining whether the nonmovant's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside. *Nicholson v. Simmons Nat'l Corp.*, 312 Ark. 291, 849 S.W.2d 483 (1993). Arkansas courts have consistently upheld the general rule that a trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict of the jury and the moving party is entitled to judgment as a matter of law. *Schmidt v. Pearson, Evans and Chadwick,* 326 Ark. 499, 931 S.W.2d 774 (1996); *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996): See also, *Anselmo v. Tuck*, 325 Ark. 211, 924 S.W.2d 798 (1996): *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992): *Dedman v. Porch,* 293 Ark. 571, 739 S.W.2d 685 (1987). In considering sufficiency of the evidence on appeal, the court will only consider evidence favorable to the appellee together with all its reasonable inferences. *Dedman, supra*."

I am unable to state that the evidence produced during this 9 day trial was insubstantial and that the jury's decision should be set aside.

With respect to the Defendant's contentions in its Motion for JNOV or in the alternative a new trial, these have been previously ruled upon and I am convinced that those rulings should stand. As I mentioned at the conclusion of the hearing on the Defendant's present motion, the jury was presented with

evidence that these three companies were operated as one company. Dep. of Mary Margaret Hamlett at p.23.

Many, if not all of the matters complained of on page 2 of the Defendants' brief in support of Motion for JNOV, etc. were not objected to or on admonishment to the jury requested.

Remittitur

At hearing, the Defendants argued that the trial court must conduct a de novo review with respect to the remittitur. In my opinion, that is for the appellate courts. The Defendants filed an affidavit of William R. Council, III, the principal financial officer of Advocat, Inc., containing financial matters as to all three corporations. This affidavit also mentioned insurance matters. The Defendants also moved to proffer Mr. Council's testimony. The Plaintiffs objected on the basis that they had sought to obtain and inquire of financial matters at the trial of the case, to which the Defendants objected and such was sustained. The basis of the objection was that since there were three corporations and therefore, it was admissible. The court agreed.

While I feel the financial conditions of the corporations would be helpful in deciding if the amount of the punitive award should stand or be reduced, the Defendants had the opportunity to submit same to the jury and chose to not do so. They now desire to furnish "new" material not available to the jury. If the appellate court feels I am in error, there is a proper method of correcting this and also granting the Plaintiffs an opportunity to attempt to meet same.

In attempting to decide all the matters presented to me, I have endeavored to examine all the cases cited and presented to me in the short time I have had available. I have examined *BMW v. Gore*, 517 U.S. 559 (1996). This case, which involved an automobile, set forth three criteria to be used in evaluating a punitive damage awarded for consistency with regard to due

process. *BMW v. Gore*, supra: *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.CT. 1678 (2001). These are (1) The degree or reprehensibility of the defendant's conduct. (2) The disparity between the harm (or potential harm) suffered by the Plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

There is no doubt in my mind that the jury considered this matter as extremely serious. The jury must have concluded that the defendant's conduct was of such a degree as to satisfy this criteria. There can be no other conclusion, based on the evidence presented at trial. I must point out that the *Gore* case involved an automobile that had suffered damage in manufacture or transportation and was repainted at a cost of $601.37 and then sold as new without disclosure. The jury found that the Plaintiff suffered actual damages of $4,000.00 and awarded $4,000,000.00 punitive damages. There can be no comparison of the conduct between these cases. In *Gore*, the court said that "the most important indicium of the reasonableness of a punitive award is the degree of reprehensibility of the defendant's conduct."

The second is the relationship between the punitive and compensatory awards. This is perhaps the most commonly cited indication of excessive punitive damage awards. *Gore* p. 550. In the *Gore* case, the jury awarded punitive damages of 1,000 times the actual harm as determined by the jury. In the present case, the punitive award is slightly in excess of 4 times.

In the *Gore* case at page 581, the court stated, "In *Haslip* we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages," might be "close to the line," it did not "cross the line into the area of constitutional impropriety." 499 U.S., at 23-24. *TXO*, following dicta in *Haslip*, refined this analysis by confirming

that the proper inquiry is "whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *TXO*, 509 U.S., at 460 (emphasis in original), quoting *Haslip*, 499 U.S., at 21.

With respect to the third criteria; the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The defendant suggests that under this indicator that the punitive award must be viewed in the light of Act 1621 of 2001 of the General Assembly stating that the civil penalty is not to exceed $50,000.00 for the death of an adult in a long-term care facility. This act states:

"SECTION 1. Arkansas Code 5-28-106(1) is amended to read as follows:

(a)(1) The State of Arkansas and the Attorney General may institute a civil action against any long-term care facility caregiver necessary to enforce any provision of this chapter.

(2) Notwithstanding any criminal penalties assessed under this chapter, any caregiver against whom any civil judgment is entered as the result of a civil action brought ~~or threatened to be brought~~ by the State of Arkansas through the Attorney General on a complaint alleging that caregiver to have abused, neglected, or exploited an endangered or impaired adult in a long-term care facility required to be licensed under §20-10-224 shall be ~~required~~ subject to pay a civil penalty ~~of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000) for each violation judicially found to have occurred.~~:

(A) Not to exceed ten thousand dollars ($10,000) for each violation judicially found to have occurred; or

(B) Not to exceed fifty thousand ($50,000) for the death of an adult in a long-term care facility which results from a single violation.

(3)(A) The State of Arkansas and the Attorney General shall not be precluded from recovering civil penalties under subdivision (a)(2)(A) of this section for the death of an adult which results from multiple violations.

(B) However, the State of Arkansas and the Attorney General shall be prohibited from recovering civil penalties under both subdivisions (a)(2)(A) and (a)(2)(B) of this section.

As I read this Act, the $50,000.00 civil penalty refers to death, but Section 2(A) refers to a $10,000.00 fine against any "caregiver to have abused, neglected, or exploited an endangered or impaired adult. . .". Would then this mean a $10,000.00 penalty per occurrence? It well could be. In this case, would there have been 5, 10, 20, 30 instances? I am unable to determine.

The *Gore* case discusses a State's interest in punishing unlawful conduct and deterring repetition. The State of Arkansas has a legitimate interest in the welfare of its citizens, especially the young and the old.

While the Court may very well believe that the amount of the verdicts both compensatory and punitive may be excessive, it has no authority to impose its belief over the decision of the jury. See *Dickson v. Delhi Seed Co., 20 Ark. App. 83 (1988)* "Courts of record have the inherent power to reduce jury awards to conform to the established facts. *Morrison v. Lowe, 274 Ark. 358, 625 S.W.2d 452 (1981); Dierks Lumber & Coal Co. v. Noles, 201 Ark. 1088, 148 S.W.2d 650 (1941).*

However, a belief by a trial court that damages are excessive is not standing alone, a sufficient ground for ordering a reduction because if that were the standard, the great discretion

of the jury would be abrogated. *Morrison, 274 Ark. at 364-65, 625 S.W.2d."*

While the jury's verdict as to compensatory damages is very large, I am at a loss as to how I can substitute my opinion for that of the jury. Obviously, the jury must have concluded that Mrs. Sauer suffered from pain and suffering. What is the value to be placed on this? If I were to reduce compensatory damages, it would be guesswork on my part. See *Dickson v. Delhi Seed, supra.*

Both parties have furnished, in their briefs, information concerning jury verdicts in other cases. I am setting these out herein, as presented. Defendants' Brief pp. 21 & 22:

1. $3,000,000; Truck Wreck. Female death, age unspecified. Survived accident for short period of time. $1,000,00 pain and suffering, $2,000,000 award to beneficiaries, number of beneficiaries and relationship not stated. *New Prospect Drilling Co. v. First Commercial Trust, 332 Ark. 466, 966 S.W.2d 233 (1998).*

2. $1,550,000; Car Wreck. Drunk driver backed into motorcycle. One 15 year old boy killed, one 15 year old boy injured. Estate of dead boy received $510,000 compensatory (some portion was mental anguish for parents, $500,000 punitive. The other boy received $40,000 compensatory, $500,000 punitive. *Warhurst v. White, 310 Ark. 546, 838 S.W.2d 350 (1992).*

3. $1,000,000; Intentional tort of assault. One year old girl physically abused over period of months by boyfriend of mother, little girl finally died. Estate of girl sued boyfriend and several doctors (for failure to report abuse). Verdict directed in favor of doctors, jury verdict against boyfriend. *First Commercial v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996).*

4. $802,000; Car wreck. Suicidal driver crossed center line intentionally and killed oncoming driver (age and personal information unknown) and injured passenger. Verdict was in favor of both, not clear how divided. Treating mental hospital also sued, got out on directed verdict. *Dodson v. Charter, 335 Ark. 96, 983 S.W.2d 98 (1998).*

5. $800,000; Medical malpractice. Young pregnant mother, surviving mother, husband and daughter. Misdiagnosis related to pregnancy, convulsions and seizures, pain and suffering for about a month. $300,000 for pain and suffering, $325,000 in favor of surviving daughter, $100,000 in favor of surviving mother, $75,000 in favor of surviving husband. *Kelley v. Wiggins, 291 Ark. 280, 724 S.W.2d 443 (1987).*

6. $550,000; Train crossing accident. Male death, no other information. Part of verdict was punitive, but not specified. Verdict was reversed and remanded since case was improperly submitted on punitive. *Missouri Pacific v. Mackey, 297 Ark. 137, 760 S.W.2d 59 (1988).*

7. $488,958; Worker fell through skylight while painting. Male death, left widow, no other information known. Reversed and remanded on non-damage issues. *D.B. Griffin Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999).*

8. $235,000; Pedestrian hit by car. Female death, married with two children. $10,000 award to estate. $75,000 to each child and husband. *Williams v. First Security Bank of Search, 293 Ark. 388, 738 S. W. 2d 99 (1987).*

9. $180,000; Medical malpractice. 70 year old lady death, surviving husband of 51 years and two adult children. Several months of suffering from complications of medical treatment. General verdict, not divided. *Jefferson Hospital v. Garrett, 304 Ark. 679, 804 S.W.2d 711 (1991)*

10. $82,500; Truck wreck. Male death, personal information unknown. Defendant admitted liability. $32,500 compensatory, $50,000 punitive. Punitive award thrown out not supported by evidence. *Vickery v. Ballentine, 293 Ark. 54, 732 S.W.2d 160 (1987)*

11. $5,200; Truck wreck. Young passenger killed, surviving parents. Young driver was driving without permission, one vehicle accident. *Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989)*

Plaintiffs' Brief pp. 36, 37 & 38:

1. *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-CV-1087 (N.D. Tex., Feb. 14, 2001). Jury awarded $2,710,000 in

compensatory damages: $310,000,000.00 in punitive damages.

2. *Rhodes v. Sensitive Care, Inc.*, No. 141-166352-96 (Tx. Dist. Ct. Tarrant Cty., October 15, 1998, $30,000.00 in actual damages and $250,000,000.00 in punitive damages.

3. *Ernst v. Horizon/CMS Healthcare Corp. D/b/a Blanco Vista Nursing and Rehabilitation Center*. No. 99-CI-08116 (285th Jud. Dist. Dt., San Antonio, Texas, Feb. 23, 2001); Jury awarded $7,000,000.00 in compensatory damages; $75,000,000.00 in punitive damages.

4. *Holder v. Beverly Enterprises – Texas, Inc.*, (TX Dist. Ct., Rusk Cty., November, 1997. $13,000,000.00 in compensatory damages and $70,000,000.00 in punitive damages.

5. *West v. Vari-Care, Inc.*, No. CV91-617, (Baldwin County Cir. Ct., Ala. Nov. 19, 1993); Verdict totaled $65,000,000.00.

6. *Rigby v. Rapp*, No. 296,896-401 (TX P.Ct., Harris Cty., January 31, 2000). $5,000,000.00 in compensatory damages and $60,000,000.00 in punitive damages. The facts in Rigby revolved around the sexual assault of a resident by another resident.

7. *Copeland v. Dallas Home for Jewish Aged, Inc.*, No. 98-04690 (Dallas Cty. Jud. Cir. Ct., Tex. May 21, 2001); Jury awarded $16,000,000.00 in compensatory damages; $34,000,000.00 in punitive damages.

8. *McCorckle v. Extendi-care Health Facilities*, No. 99-00815-CIV-011 (Fla. Cir. Ct., Pinellas Cty., Sep. 2000); Jury awarded $2,994,527.32 in compensatory damages; $17,000,000.00 in punitive damages.

9. *Collins v. Beverly Enterprises-Florida, Inc.*, No. 98-433-CA (Taylor Ct. Jud. Cir. Ct., Fla. Mar. 31, 2000); Jury awarded

$2,021,630.83 in compensatory damages; $10,000,000.00 in punitive damages.

10. *Auld v. Horizon/CMS Healthcare Corporation*, No. 48-165121-96 (TX Dist. Ct., Potter Cty., December 22, 1998). $2,500,000.00 in compensatory damages and $10,000,000.00 in punitive damages.

11. *Trestle v. Comprehensive Health Care Associates, Inc.*, No. 81-085-A (TX Dist. Ct., Potter Cty., December 22, 1998). $2,500,000.00 in compensatory damages and $10,000,000.00 in punitive damages.

12. *Olsen v. Chisolm Trail Living & Rehabilitation Center, et al.*, No. 98-0-363 (TX Dist. Ct., Caldwell Cty., September 16, 1999); $8,000,000.00 in compensatory damages and $7,000,000.00 in punitive damages.

13. *The Estate of Marion Heide v. York Hanover Nursing Centers, Inc., et al.*, No. 97-7102CA (Pasco Cir. Ct., Fla. March 31, 1999); A Pasco County jury awarded the plaintiff over $5,060,000.00 in compensatory damages.

14. *Muccianti v. Willow Creek Care Center*, No. 625122-7 (Fresno Cty. Super. Ct., Cal. April 4, 2001); Jury awarded $717,927.63 in compensatory damages; $4,500,000.00 in punitive damages.

15. *The Estate of James Earl Lowe v. Beverly California Corporation*, No. 94-2006 CA; (Fla. Cir. Ct., Marion Cty., May 1996); A Marion County jury awarded the plaintiff $225,000.00 in compensatory damages and $2,5000,000.00 in punitive damages.

16. *The Estate of John Lee Butler v. LCA Operational Holding Company, et al.*, No. 96-7862-D (Hillsborough Cty. Cir. Ct. Hillsborough Cty. March 22, 1999); A Hilsborough County jury awarded the plaintiff $15,000,000.00 in compensatory damages.

1. *Nash v. Compton Mgmt., Inc.*, CIV-99-34 (Cross Co. Cir. Ct., Ark. 2001). Jury awarded $2,300,000.00 in compensatory damages and $10,000,000.00 in punitive damages.

2. *Jones v. Advocat, Inc.*, No. CIV-99-67-2, (Hot Springs Cty. Cir. Ct., Ark. 2000). Jury awarded $1,000,000.00 in compensatory damages and $2,000,000.00 in punitive damages.

3. *Morehead v. Health Facilities Management Corp.*, No. CIV-99-3514, (Pulaski Cty. Cir. Ct., Ark. 2001). Jury awarded $565,000.00 in compensatory damages and $1,000,000.00 in punitive damages.

4. *Boatright v. Healthcare Center at Good Shepherd, Inc.*, No. CV-00-1193, (Pulaski Cty. Cir. Ct., Ark. 2001); Jury awarded $1,020,000.00 in damages.

Before going further, one must note that the cases referred to by the Plaintiffs were mostly out of state cases and were trial court verdicts, rather than Appellate Court cases. I must assume that the verdicts were indeed rendered. I can only assume these cases were not appealed, or have not reached decision. However, they are, or appear to be, jury awards.

I would hope all parties and attorneys will note that I have given careful and full consideration not only to the jury's decision, but to the motions, briefs and arguments.

While I feel the verdict is extremely large, I just do not think I can enter a substitute of my belief for that of the jury in this case. What basis can I give for setting a lesser amount that would not be arbitrary? If one must guess, I would feel it should be with the jury's decision. I am of the opinion that criteria 1

and 2 of the *Gore* guideposts have been met and that should be sufficient.

Very truly yours,

/s/

Gayle Ford

GF:mb

JUDGMENT OF THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS DATED JUNE 29, 2001

In the Circuit Court of Polk County, Arkansas.

LON C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Plaintiff

vs.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; Diversicare Management Services Co.; Diversicare Corporation of America-Arkansas; Diversicare Corporation of America, Defendants

No. CIV-2000-5

June 29, 2001.

JUDGMENT

On June 8-15 and June 18-23, 2001, this cause came on to be heard and the Plaintiff, appearing in person and by his attorneys, Wilkes & McHugh and Daniel B. Thrailkill and the Defendants appearing by their attorneys, Dover & Dixon, P.A., and all parties announcing ready for trial, whereupon a jury from the regular panel of petit jurors of this Court for this term was selected and empaneled and sworn according to law to try the issues of fact arising herein; and after hearing the evidence introduced, the instructions of the Court and the arguments of counsel, said jury retired to consider its verdict and after deliberating thereon for a time, returned in this open Court the following verdict:

Count I - Ordinary Negligence

Do you find from a preponderance of the evidence that there was negligence on the part of Advocat, Inc. that was the cause of the damages or injuries sustained by Margaretha Sauer? Yes.

Do you find from a preponderance of the evidence that there was negligence on the part of Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center that was the cause of the damages or injuries sustained by Margaretha Sauer? Yes.

Do you find from a preponderance of the evidence that there was negligence on the part of Diversicare Management Services Co. that was the cause of the damages or injuries sustained by Margaretha Sauer? Yes.

If you answered Yes to any of the above questions, please proceed; on the claim for ordinary negligence, we the jury award damages as follows; Estate of Margaretha Sauer $5 Million.

/s/ Billy K. Maxey
John Grogen, Jr.
Patricia Chamberlain
Dwayne Terpin
John Bachelor
Joyce Ross
Lorene Smalley
Becky Johnson
Maryetta Gilleam
Linda Lance
Lorna Deramus

Count II - Medical Malpractice

Do you find from a preponderance of the evidence that Advocat, Inc. failed to use reasonable care in treating Margaretha Sauer with a degree of skill and learning ordinarily possessed and used by nursing home facilities in the same or

similar locality; which was the proximate cause of any damages to Margaretha Sauer? Yes

Do you find from a preponderance of the evidence that Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center failed to use reasonable care in treating Margaretha Sauer with a degree of skill and learning ordinarily possessed and used by nursing home facilities in the same or similar locality; which was the proximate cause of any damages to Margaretha Sauer? Yes

Do you find from a preponderance of the evidence that Diversicare Management Services Co. failed to use reasonable care in treating Margaretha Sauer with a degree of skill and learning ordinarily possessed and used by nursing home facilities in the same or similar locality, which was the proximate cause of any damages to Margaretha Sauer? Yes

If you answered Yes to any of the above questions, please proceed; on the claim for medical malpractice, we, the jury, award damages as follows:

Estate of Margaretha Sauer $10 Million

/s/ Billy K. Maxey, Foreperson

Count III - Breach of Contract Claim

Do you find from a preponderance of the evidence that Defendant Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center breached an agreement with Margaretha Sauer? Yes

If you answered "Yes" to the above question, please proceed:

Do you find that Margaretha Sauer suffered monetary damages as a result of the breach? Yes

If you answered "Yes" to the above questions, please proceed:

On the claim for breach of contract, we the jury, find for the Estate of Margaretha Sauer against the Defendant, Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center and award damages as follows:

$25,000.00

/s/ Billy K. Maxey, Foreperson

Count IV - Wrongful Death Claim

Do you find from a preponderance of the evidence that the conduct of Advocat, Inc. was the proximate cause of the death of Margaretha Sauer? Yes

Do you find from a preponderance of the evidence that the conduct of Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center was the proximate cause of the death of Margaretha Sauer? Yes

Do you find from a preponderance of the evidence that the conduct of Diversicare Management Services Co. was the proximate cause of the death of Margaretha Sauer? Yes

If you answered "Yes" to any of the above questions, please proceed:

On the claim for wrongful death, we the jury, find for the Plaintiffs, and assess the damages as follows:

Lon Sauer	$100,000.00
Paul Sauer	$100,000.00
Carl Sauer	$100,000.00
Edrich Sauer	$100,000.00

/s/ Billy K. Maxey, Foreperson

Punitive Damages

Do you find from a preponderance of the evidence that the punitive damages against Advocat, Inc. are warranted? Yes

Do you find from a preponderance of the evidence that punitive damages against Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center are warranted? Yes

Do you find from a preponderance of the evidence that punitive damages against Diversicare Management Services Co. are warranted? Yes

/s/ Billy K. Maxey, Foreperson

Punitive Damages Verdict Form

For each Defendant that you answered "Yes" to the question of whether punitive damages are warranted, state the amount of punitive damages.

1. Advocat, Inc. $21 Million
2. Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center $21 Million
3. Diversicare Management Services Co. $21 Million

/s/ Billy K. Maxey, Foreperson

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff, Lon C. Sauer, as Administrator of the Estate of Margaretha Sauer, Deceased have and recover from the Defendant Advocat, Inc. the sum of $15,400,000 for compensatory damages jointly and severally with the other Defendants and in addition punitive damages in the amount of $21,000,000 separately; that the Plaintiff, Lon C. Sauer as Administrator of the Estate of Margaretha Sauer, Deceased have of and recover from the Defendant Diversicare Management Services Co. the sum of $15,400,000 for

compensatory damages jointly and severally with the other Defendants and in addition punitive damages in the amount of $21,000,000 separately; that the Plaintiff, Lon C. Sauer as Administrator of the Estate of Margaretha Sauer, Deceased have of and recover from the Defendant Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center the sum of $15,400,000.00 for compensatory damages jointly and severally with the other Defendants and $25,000 separately and in addition punitive damages in the amount of $21,000,000 separately, all of the above together with interest from the date of entry until satisfied as provided by Ark. Code Ann. § 16-64-114(a).

/s/

Honorable Gayle Ford, Circuit Judge

Date: 6/29/01

/s/
DOVER & DIXON, P.A.
425 W. Capitol, Suite 3700
Little Rock, AR 72201

/s/
PAGE, THRAILKILL, AND McDANIEL
311 DeQueen Street
Mena, AR 71953

/s/
WILKES & McHUGH
425 W. Capitol, Suite 3500
Little Rock, AR 72201

EXCERPTS OF BRIEF IN SUPPORT OF MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT AND REMITTITUR OR, IN THE ALTERNATIVE, A NEW TRIAL FILED JULY 9, 2001

In the Circuit Court of Polk County, Arkansas.

LON C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Plaintiff

vs.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; Diversicare Management Services Co.; Diversicare Corporation of America-Arkansas; Diversicare Corporation of America, Defendants

No. CIV-2000-5

INTRODUCTION

Margaretha Sauer was 93 years of age at the time of her death. She had been a resident of Rich Mountain Nursing & Rehabilitation Center for approximately 5 ½ years prior to her death. Upon admission to the facility in 1993, she had the pre-existing conditions of Alzheimer's dementia, dehydration, malnutrition, chronic urinary tract infections, and skin breakdown. She continued to have many of these same problems and died July 19, 1998, 14 hours after her admission to the Mena Medical Center. The cause of Mrs. Sauer's death was an electrolyte imbalance.

A lawsuit was filed by her estate claiming damages for ordinary negligence, medical malpractice, breach of contract, and wrongful death, as well as a request for punitive damages. The jury attributed the cause of death to negligence of the Defendants', even though the Plaintiffs own treating physician testified that Mrs. Sauer died as a result of severe end stage Alzheimer's disease.[1]

Over Defendants' objections, Plaintiffs introduced evidence concerning general conditions within the facility and problems with residents other than Ms. Sauer. The basis of these objections was that these matters had little, if any, relevance to the specific care and treatment that Mrs. Sauer received. Moreover, it was argued that any probative value was substantially outweighed by the possibility of unfair prejudice to the Defendants. In retrospect it is clear now how prejudicial this evidence was.

Plaintiffs argued to the jury that residents, in general, were neglected at the facility, that residents were "lined up and bathed like cattle in cold showers", that residents commonly "languished in their own waste", and that residents were not fed or given necessary supplies and treatments. Plaintiffs also made other inflammatory statements, including that Mrs. Sauer suffered from a "decubitus ulcer the size of a Florida grapefruit", that the facility treated Mrs. Sauer like a "bag of

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[1] It was not disputed that near her death and as a result of her Alzheimer's disease, Mrs. Sauer refused to eat and drink. Her condition became so critical that a decision was eventually made to insert a feeding tube. The undisputed evidence at trial was that Mrs. Sauer saw a urologist in early July based upon the belief that she was suffering from cancer and the family was waiting on the test results before deciding whether to allow a feeding tube. The evidence is further undisputed that if a feeding tube had been allowed at the time of the initial urology exam, no death would have occurred. After finally receiving the results, the family requested a feeding tube. Unfortunately, this decision came too late for Mrs. Sauer.

bones", and that she was seen as a "goldfish that could be flushed down the toilet when her usefulness was up."

All of these statements were absolutely untrue. These emotional phases created a volatile environment of passion and prejudice. In closing, Plaintiff's counsel further inflamed the jury by stating that no one at Advocat even bothered to show up for trial (a fact that was not true) and the jury needed to "send a message to the board of directors in Canada" (another untrue fact) for this "large, multi-national, for-profit corporation" that was "only concerned about budgets and Wall Street performance" rather than patient care.

As a result of these improper arguments, the jury rendered an obviously excessive award that had absolutely no relationship to the damages actually sustained. The jury returned 13 separate verdicts, which can be itemized as follows:

1) Negligence against Advocat (jointly and severally) for $5,000,000
2) Medical Malpractice against Advocat (jointly and severally) for $10,000,000
3) Wrongful Death against Advocat (jointly and severally) for $400,000
4) Punitive Damages against Advocat for $21,000,000
5) Negligence against Diversicare Management (jointly and severally) for $5,000,000
6) Medical Malpractice against Diversicare Management (jointly and severally) for $10,000,000
7) Wrongful Death against Diversicare Management (jointly and severally) for $400,000
8) Punitive Damages against Diversicare Management for $21,000,000
9) Negligence against Diversicare Leasing (jointly and severally) for $5,000,000
10) Medical Malpractice against Diversicare Leasing (jointly and severally) for $10,000,000

11) Wrongful Death against Diversicare Leasing (jointly and severally) for $400,000
12) Breach of Contract against Diversicare Leasing for $25,000
13) Punitive Damages against Diversicare Leasing for $21,000,000

These verdicts total $78,425,000.

I.

FACTS

ADVOCAT, Diversicare Management Services Co. ("DMS"), and Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center ("RICH MOUNTAIN") are separate corporations under Arkansas law. The facts presented at trial were that RICH MOUNTAIN was the "licensee" and the corporation authorized to do business by the State of Arkansas as a Nursing Home. RICH MOUNTAIN employed the individuals responsible for the care being given to Mrs. Sauer. The admission agreement was between RICH MOUNTAIN and Mrs. Sauer.

The only involvement DMS had in this case was that the administrator of RICH MOUNTAIN was its employee and it provided certain administrative services to RICH MOUNTAIN. ADVOCAT merely owns DMS and RICH MOUNTAIN. The amended complaint alleged that DMS assumed liability for RICH MOUNTAIN pursuant to a management agreement. ¶ 5 Amended Complaint. No such assumption of liability was proven at trial. The amended complaint further alleged that ADVOCAT was the alter ego of RICH MOUNTAIN and DMS. This allegation was also not proven at trial, nor was the jury instructed on an alter ego theory. As separate legal entities each defendant is entitled to have the case against it decided

independent of the other, and the jury was so instructed in this case.

II.

* * *

III.

MOTION FOR JNOV, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL SHOULD BE GRANTED TO SEPARATE DEFENDANT, ADVOCAT, BECAUSE NO SUBSTANTIAL EVIDENCE AGAINST ADVOCAT WAS PROFFERED SUFFICIENT TO SUPPORT THE JURY'S VERDICT ON ANY ACCOUNT

A. Independent Evidence of the Counts Alleged Against ADVOCAT Are Necessary Because ADVOCAT Is Not the Alter Ego of Either DMS or RICH MOUNTAIN

No Evidence Was Presented Nor Was The Jury Instructed To Determine That DMS or Rich Mountain Was The Alter Egos of Advocat.

At trial no evidence was presented to show that ADVOCAT was the alter ego of DMS or RICH MOUNTAIN yet the plaintiffs argued to the jury that it should treat the Defendant's as one urging them to "pierce the corporate veil" and hold ADVOCAT liable for the actions of its subsidiaries. In ***Thomsen Family Trust v. Peterson Family Enterprises, Inc., 66 Ark. App. 294; 989 S.W.2d 934 (1999)*** the Arkansas Court of Appeals stated:

> It is a nearly universal rule that a corporation and its stockholders are separate and distinct entities, even though a stockholder may own the majority of the stock. In special circumstances, the court

> will disregard the corporate facade when the corporate form has been illegally abused to the injury of a third party. The conditions under which the corporate entity may be disregarded or looked upon as the alter ego of the principal stockholder vary according to the circumstances of each case. The doctrine of piercing the corporate veil is founded in equity and is applied when the facts warrant its application to prevent an injustice. Piercing the fiction of a corporate entity should be applied with great caution.

There was no evidence that the corporate structure was illegally abused, much less abused in such a way to cause Mrs. Sauer any harm.

In Abdel-Fattah v. Pepsico, 948 S.W.2d 381 (Tex. App. 1997), the Plaintiff sought to hold Pepsico liable for injuries that occurred at a Taco Bell. Taco Bell is a wholly owned subsidiary of Pepsico. The Texas Court of Appeals held that a parent corporation is not liable for the actions of its wholly owned subsidiaries. ***Id.***

Since no evidence was presented at trial that would justify "piecing the corporate veil", and because the jury was instructed to treat the Defendant's as separate entities, the plaintiffs are required to prove that some independent conduct by ADVOCAT proximately caused an injury. This issue is discussed in detail below.

B. The Jury's Verdict Against ADVOCAT On The Count Of Negligence Cannot Stand, As A Matter of Law, Because ADVOCAT Owed No Duty To Mrs. Sauer, and Even If it Did, No Evidence Suggesting It Failed To Meet That Duty Was Introduced At Trial.

The Plaintiff contends and the jury found that ADVOCAT was guilty of negligence. The only allegation raised at trial regarding ADVOCAT, however, was that it approved a consolidated budget for all the nursing homes that were managed by its subsidiary DMS. This budget was approved in a non-detailed and consolidated manner after being formulated at the facility level based upon the past year's experience and the upcoming year's projections, and after being reviewed by various officers of DMS.

As a matter of law, there was no duty owed by ADVOCAT to the plaintiff. Mrs. Sauer contracted with RICH MOUNTAIN to provide her with nursing home care. RICH MOUNTAIN was the entity responsible for her care. The plaintiff's contention that ADVOCAT failed to provide an adequate budget can not serve as the basis for an independent cause of action.

Second, even if ADVOCAT were held to owe a duty to Mr. Sauer, plaintiffs presented no evidence that ADVOCAT committed any act that was negligent. The allegation was that ADVOCAT failed to provide an adequate budget, and that allegation was not proven. The only evidence in the record with respect to this contention is that ADVOCAT approved a budget. There is no evidence to show what an appropriate budget should have been, no evidence regarding any industry standard, no evidence to show what the actual budget was, no evidence to show that the actual budget was insufficient, and no evidence to show what the actual expenditures were. A budget is only a projection. There was no evidence presented that RICH

MOUNTAIN was over or under any budget approved by ADVOCAT. In fact the only evidence in the record regarding the budget supports the proposition that the budget was adequate. Mark Hemingway, former regional vice president of DLMS, who stated that he had no knowledge of any of the specifics regarding RICH MOUNTAIN's budget, and testified that he would never budget below what the nurses said was needed. In addition, Mr. Hemmingway testified that in his opinion none of the problems RICH MOUNTAIN was experiencing was a result of any budget concern but was the result of the long term Administrator and long term Director of Nursing retiring. Moreover, Mike Shepard, RICH MOUNTAIN'S former Administrator, and Dana Bryant, Rich Mountain's former Director of Nursing, both testified that the budget was sufficient and that adequate money for staffing existed in the budget, but the problem was the difficulty in finding appropriate personnel, despite constant advertising. All caregivers testified that they always had the right to work overtime or to call in help when needed. Competitive wages and sign-on bonuses were used to attract employees. The jury's verdict against ADVOCAT for failure to provide an adequate budget is speculative at best and cannot stand.

Finally, even if the alleged failure to provide an adequate budget could be the basis for a negligence claim, there is no evidence in the record to support the allegation that this had anything to do with the alleged injury of the plaintiff. There is no substantial evidence to show that ADVOCAT's approval of the budget proximately caused the plaintiff any harm. The jury's verdict that ADVOCAT was negligent should be set aside.

* * *

E. The Award of Punitive Damages Against ADVOCAT Must Be Set Aside Because It Conducted No Tortuous Activity Towards Mrs. Sauer, And, As A Result, No Compensatory Damages Are Available to Support It.

Since the verdicts against ADVOCAT must be set aside because there was no substantial evidence that would support a claim for either negligence, medical malpractice, or wrongful death, the plaintiffs have no entitlement to any award of compensatory damages against ADVOCAT. Without an award of compensatory damages an award of punitive damages can not stand. ***Olmstead v. Moody, 311 Ark. 163, 842 S.W.2d 26 (1992).*** Therefore, the award of punitive damages against ADVOCAT should be set aside. In addition, even if this Court were to uphold one of the verdicts against ADVOCAT, the punitive damage award against it would still need to be set aside as more fully discussed below. Punitive damages are to be a penalty for conduct that is malicious or done with the deliberate intent to injure another. ***United Insurance Company of America v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998).*** Punitive damages are not compensation for injury but are private fines levied by civil juries to punish and deter. ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 69 USLW 4299 (U.S. May 14, 2001).*** An instruction for punitive damages may be given when there is evidence that a party likely "knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred." (emphasis added). ***McLaughlin v. Cox, 324 Ark. 361, 371, 922 S.W.3d 327, 333 (1996)*** (quoting ***Allred v. Demuth, 319 Ark. 62, 890 S.W.3d 578 (1994)*** (quoting ***Don Gary Holsteine Leasing, Inc. v. Covington, 293 Ark. 112, 732***

S.W.2d 465 (1987). Punitive damages are justified only when the defendant acts wantonly or with such conscious indifference to the consequences of his acts that malice may be inferred. ***J.B. Hunt Transportation, Inc. v. Doss, 320 Ark. 660, 899 S.W.2d 464 (1995).*** Negligence, however gross, will not support such an award. ***Id.***

There is simply no way that approval of a budget could support an award of punitive damages under this standard, especially given the unchallenged testimony that lack of funding was not the cause of any injury suffered by the plaintiff. The award of punitive damages against ADVOCAT must be set aside.

In addition, if the Court sets aside only one of the above verdicts either negligence or malpractice, the Arkansas Supreme Court has held that an award of compensatory and punitive damages are so interwoven that error made with respect to one award of damages requires a retrial of the entire case. ***Wilson v. Fullerton, 332 Ark. 111, 964 S.W.2d 208 (1998).***

IV.

MOTION FOR JNOV, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL SHOULD BE GRANTED TO SEPARATE DEFENDANT, DIVERSICARE MANAGEMENT SERVICES BECAUSE NO SUBSTANTIAL EVIDENCE AGAINST DIVERSICARE MANAGEMENT SERVICES WAS PROFFERED SUFFICIENT TO SUPPORT THE JURY'S VERDICT ON ANY ACCOUNT

A. Independent Evidence of the Counts Alleged Against DMS Are Necessary Because DMS Is Not the Alter Ego of Either ADVOCAT or RICH MOUNTAIN

At trial, no evidence was presented to show that DMS was the alter ego of ADVOCAT or RICH MOUNTAIN. Since there was no substantial evidence to show that DMS was the alter ego of either ADVOCAT or RICH MOUNTAIN the plaintiff must prove that some independent conduct of DMS caused the plaintiff an injury. See ***Thomsen Family Trust, supra,*** and ***Abdel-Fettah v. Pepsico, supra.*** The jury was instructed to treat each Defendant separately.

B. The Jury's Verdict Against DMS On The Count Of Negligence Cannot Stand, As A Matter of Law, Because DMS Owed No Duty To Mrs. Sauer, and Even If it Did, No Evidence Suggesting It Failed To Meet That Duty Was Introduced At Trial.

The plaintiff contends and the jury found that DMS was guilty of negligence. The only evidence at trial with respect to DMS is that DMS provided administrative services to RICH MOUNTAIN. No evidence at trial was presented that was adverse to DMS's administration of RICH MOUNTAIN. RICH MOUNTAIN employed the caregivers. These are the individuals with the duty to meet a certain standard of care that Plaintiff's experts say was not given. Since no evidence at trial was presented that would substantiate in any manner a negligence claim against DMS the jury's verdict must be set aside. In addition, if the Plaintiff contends that DMS's administration was inappropriate in any manner, Plaintiff would have to prove that this proximately caused Ms. Sauer some harm.

* * *

E. The Award of Punitive Damages Against DMS Must Be Set Aside Because It Conducted No Tortious Activity Towards Ms. Sauer, And, As A Result, No Compensatory Damages Are Available to Support It.

Since there was no substantial evidence to support an award for negligence or medical malpractice then those awards should be set aside. Without an award of compensatory damages, the punitive damage award cannot stand and should be set aside. ***Olmstead v. Moody, 311 Ark. 163, 842 S.W.2d 26 (1992).***

In addition should the Court find that substantial evidences supports a verdict against DMS, the punitive damage award against DMS must still be set aside because there is no substantial evidence in the record to sustain an award of punitive damages against it. In fact the only evidence in the record with regard to DMS is that it employed the administrator of RICH MOUNTAIN, a fact which is clearly insufficient to meet the high standard required for an award of punitive damages.

V.

MOTION FOR JNOV, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL SHOULD BE GRANTED BECAUSE THE JURY'S VERDICT, IN THE CURRENT FORM, CANNOT BE SUSTAINED AS A MATTER OF LAW.

DIVERSICARE LEASING CORPORATION d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER (RICH MOUNTAIN)

C. The Jury's Award Of Punitive Damages Against RICH MOUNTAIN Must Be Set Aside Because There Was No Substituted Evidence To Support Such An Award.

A claim of punitive damages against RICH MOUNTAIN was not justified by the evidence. RICH MOUNTAIN is the operator of the nursing home. Numerous times during the trial plaintiff's counsel stated that he did not blame or place fault on the actual caregivers of RICH MOUNTAIN and that they did everything they could to take care of Ms. Sauer but were prohibited from performing their job by the alleged budgetary restraints placed on them by the corporate headquarters. Those budgetary constraints were never, in fact, shown to exist. There was never any effort to show that any alleged budgetary constraint had any thing to do with the care given to Mrs. Sauer.

In order to sustain an award of punitive damages, the plaintiff must prove malice or conscious indifference from which malice may be inferred. Plaintiffs counsel's own statements to the jury indicate that an award of punitive damages should not stand against RICH MOUNTAIN. Plaintiff's own expert, Dr. Williams, testified that Plaintiff received good care until approximately April 1998. Dr. Williams' opinion was that RICH MOUNTAIN's nurses failed to recognize the sudden decline in Mrs. Sauer's condition and failed to report the changes to Dr. Brown. Negligence alone, no matter how gross, cannot support a claim for punitive damages. ***Mo. Pacific Railroad Co. v. Mackey, 297 Ark. 137, 760 S.W.2d 59 (1988).***

If the Court will focus on the Plaintiff's allegations as they relate solely to Mrs. Sauer and not be distracted by other issues not relevant to the care given to Mrs. Sauer then the Court must find that there is no evidence to support a claim for punitive damages. Since there was no substantial evidence to support a claim for punitive damages against RICH MOUNTAIN the award should be set aside.

VI.

THE AMOUNT OF THE AWARD GRANTED TO PLAINTIFFS IN THIS CASE MUST BE REMITTED BECAUSE IT WAS GROSSLY EXCESSIVE, WAS THE RESULT OF PASSION OR PREJUDICE, AND SHOULD SHOCK THE COURT'S CONSCIENCE.

* * *

The plaintiffs chose at trial to concentrate not on the specific care rendered to Mrs. Sauer and her damages but instead spent a majority of the time discussing the overall condition of RICH MOUNTAIN regardless of whether it related to Ms. Sauer or not. This tactic, combined with the inflammatory language used by plaintiff's counsel during trial and in opening and closing arguments caused the jury to focus not on the specifics of this case as they relate to Mrs. Sauer, but on other problems that may have existed in the nursing home that had nothing to do with the care and treatment of Mrs. Sauer. One glaring example is the survey that was admitted into evidence and the resulting loss of the nursing home's medicare certification. It was stipulated at trial that none of the deficiencies related to Mrs. Sauer and that she was not in the case mix, yet plaintiffs' counsel repeatedly referred to the general problems at the home as though they were somehow relevant to this case. Also, unsubstantiated testimony was introduced and inflammatory statements were made that the residents were lined up in the hall for showers like cattle when the evidence was that because of Mrs. Sauer's condition she had bed baths. Testimony was allowed that call lights of residents went unanswered for hours yet the evidence was that Mrs. Sauer was unable to use her call light because of her condition. These are just two examples of the inflammatory testimony regarding the overall condition of the nursing home that in no way related to the care of Mrs. Sauer. The purpose of

this testimony and the comments made by plaintiff's counsel to fan the flame of passion such as "bag of bones" and "multinational corporation with board of directors in Canada" contributed to the excessive verdict based on passion and prejudice and not on the actual care rendered to Mrs. Sauer.

* * *

B. The Award of Punitive Damages Should Be Set Aside Because It Is Grossly Excessive, Based Upon Passion Or Prejudice, Unconstitutional Under Both The Arkansas and United States Constitutions And Is Effectively The Equivalent To An Economic Death Sentence Carried Out Against Defendants.

The jury in this case awarded punitive damages against ADVOCAT, DMS, and RICH MOUNTAIN in the amount of $21,000,000 each. These verdicts totaling $63,000,000 are excessive.

The Arkansas Supreme Court reviews an award of punitive damages by considering the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. ***United Insurance Company of America v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998).*** Punitive damages are to be a penalty for conduct that is malicious or done with the deliberate intent to injure another. ***Id.*** An instruction for punitive damages may be given when there is evidence that a party likely "knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct in reckless disregard of the consequences from which *malice* could be inferred." (emphasis added). ***McLaughlin v. Cox, 324 Ark. 361, 371, 922 S.W.2d 327, 333 (1996)*** (quoting ***Allred v. Demuth, 319 Ark. 62, 890***

S.W.2d 578 (1994) (quoting ***Don Gary Holsteine Leasing, Inc. v. Covington, 293 Ark. 112, 732 S.W.2d 465 (1987)***). Punitive damages are justified only when the defendant acts wantonly or with such conscious indifference to the consequences of his acts that malice may be inferred. ***J.B. Hunt Transportation, Inc. v. Doss, 320 Ark. 660, 899 S.W.2d 464 (1995).*** Negligence, however gross, will not support such an award. ***Id.***

The amount of punitive damages lies within the discretion of the jury however the amount of the award can not shock the conscious of the court or indicate passion or prejudice upon the part of the jury. The trial judge has not only the right but the obligation to conduct an independent review to insure any award is proper and justified.

Attached hereto (but filed under seal because the financial information has yet to be publicly released), as Exhibit "A" is the affidavit of William R. Council, III, Principal Financial Officer of Advocat, Inc. These financial statements show that Diversicare Leasing has equity of $4,201,729, DMS a negative equity position of $3,805,272 and Advocat on an unconsolidated basis a negative equity position of $7,478,280 and on a consolidated basis equity of only $269,679. Punitive damages awards against each corporation in the amount of $21,000,000 are clearly grossly excessive given the financial condition of the three defendants. In this case given the financial condition of the Defendants as shown by the affidavit of Will Council it is obvious that the fines are excessive, cruel, and unusual. The enormity of these verdicts are in effect a corporate death sentence and will cause the closure of RICH MOUNTAIN and approximately 49 other nursing homes across the United States.

In addition to the Arkansas Law on punitive damages, the federal constitution prohibits excessive awards of punitive damages. The Defendants raise several federal constitutional challenges to the punitive damage verdicts assessed against each of them. Specifically, they raise procedural due process

challenges to the verdicts because they had no notice from either statutes enacted by the legislature or prior Arkansas verdicts that they each could be punished by $21,000,000 in punitive damage verdicts for conduct in connection with Mrs. Sauer. Furthermore, Defendants' procedural due process right to a fundamentally fair procedure are abridged because the Arkansas Rules of Procedure have the effect of precluding the Defendants from citing to the trial transcript to support these constitutional challenges to the verdict, as well as precluding this Court from reviewing portions of the transcript as this Court conducts its independent analysis of the excessiveness of these verdicts under the guideposts articulated by the U.S. Supreme Court. Defendants also challenge the constitutionality of the punitive damage verdicts, as these verdicts impermissibly sanction the Defendants for their activities and assets outside of Arkansas. The Defendants also assert that these verdicts violate their Eighth Amendment rights, as the verdicts effectively constitute a corporate death penalty for the Defendants constituting cruel and unusual punishment. Finally, these punitive damage verdicts violate the Defendants' substantive due process rights, as the verdicts are unconstitutionally excessive. Each of these federal constitutional issues requires independent judicial evaluation, and will be subject to de novo review on appeal. ***Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 69 USLW 4299 (U.S. May 14, 2001)**("Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convinces us that courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards.") Defendants are entitled to a new trial because the unconstitutionally excessive verdicts demonstrate that juror passions and prejudices were inflamed against the Defendants resulting in excessive punishment of entities doing business in Arkansas, but having operations elsewhere. The United States Supreme Court held in ***Honda v. Oberg, 512 U.S. 415 (1994)*** that trial and appellate courts must independently evaluate the

constitutionality of punitive damage verdicts as "[j]udicial review of the amount awarded was one of the few procedural safeguards which the common law provided against "the "potential that juries will use their verdicts to express biases against big business . . ." and other outsiders like the Defendants in this case. *Id. at 432.* Furthermore, under the holding of ***Cooper Indus, Inc. v. Leatherman Tool Group, Inc., 69 USL W 4299 (U.S. May 14, 2001)***, "[T]he level of punitive damages is not really a 'fact' 'tried' by a jury", and thus, this Court is not obliged to defer to the jury's punitive damages determination as though it were a fact found by the jury. ***Id. at 4303.*** Under *Cooper* and *Honda*, this Court must examine the evidence to independently determine from a constitutional perspective whether the conduct of each Defendant was sufficiently egregious to support a $21,000,000 punitive damage verdict, for total punitive damage verdicts against the Defendants of $63,000,000.

In ***BMW v. Gore, 517 U.S. 559 (1996)***, the United States Supreme Court held that there were constitutional limits on a states right to punish wrongdoers. The Court stated: "The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive" punishment on a tortfeasor." ***BMW 517 U.S. at 562.*** The Court started the decision in ***BMW*** with the premise that:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.

517 U.S. at 574

The Supreme Court went on to list three guideposts to be used to determine if the tortfeasor received adequate notice of

the magnitude of the sanction that might be imposed. Those three guideposts are:

> (1) the degree of reprehensibility of the nondisclosure;
> (2) the disparity between the harm and the punitive damage award; and
> (3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases.

This Court should provide a record of its analysis and conclusions using the ***BMW*** guideposts ***Cooper*** mandates a *de novo* appellate review of this Courts determination.

The first factor is the degree of reprehensibility of the defendant's conduct. Each defendant is entitled to have his conduct viewed independently of the other. In this case there is no evidence that any of the Defendant's acted out of malice or engaged in any intentional conduct that caused Mrs. Sauer any injury. Numerous times during trial Plaintiff's attorney pointed out that they were not critical of the efforts of the caregivers of RICH MOUNTAIN. If Plaintiffs are not critical of the caregivers then the jury and the Court should not be either. Thus, there is no support for the punitive damage verdicts.

The second factor is the disparity between the harm and the punitive damage award. Punitive damages must be a reasonable relationship to compensatory damages. A punitive damage award of $63,000,000 does not bear any relationship to the evidence presented at trial as to the compensatory damages that a jury could reasonably have been expected to award. The relationship of the inframed double recovery excessive compensatory damages indicates that the punitive damages are unconstitutionally excessive.

The third guidepost is to compare the punitive damage award to the civil or criminal penalties that could be imposed.

A reviewing court should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct. ***BMW at p. 583.*** Act 1621 of 2001 passed during the most recent legislative session provides that a long-term care facility shall be subject to a civil penalty not to exceed $50,000 for the death of an adult in a long-term care facility. This legislative judgment concerning appropriate punishment for deaths involving adult long-term care patients should be given substantial deference as it reflects the legislative judgment of the appropriate level of punishment, weighing all of the interests including the need for affordable long-term care facilities to serve the needs of Arkansas residents. The $63,000,000 economic sanction imposed by the jury in this case is 1,260 times greater than the maximum civil penalty authorized by the Arkansas General Assembly. Similarly, these verdicts exceed by nearly seven times the largest reported punitive damage verdict in Arkansas. ***Smith v. Hansen, 323 Ark. 188, 914 S.W.2d 285 (1996)*** ($2,050,000 punitive damage verdict for assault and robbery on married couple). Accordingly, under the ***BMW*** guideposts the punitive damage verdicts are unconstitutionally excessive. The Defendants had no advance notice that their conduct within Arkansas could subject them to punitive damage verdicts of $21,000,000 each. More than merely providing notice of the degree of punishment that may be imposed, due process ensures that unpopular defendants are not subjected to arbitrary punishment amounts. *See, BMW, supra,* 517 U.S. at 587 ("Requiring the application of law, rather than a decision maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment, it also helps assure the uniform treatment of similarly situation persons that is the essence of the law itself."). Accordingly, these unconstitutional and excessive punitive damage verdicts violate each Defendant's procedural due process federal constitutional rights.

Additionally, this Court's ability to evaluate the constitutionality of the punitive damage verdicts necessarily is hampered as a practical result of Arkansas procedural rules requiring determination by a trial court of all post verdict motions before the transcript of the trial is available to assist this Court in conducting its *BMW* guidepost analysis. This is most important in connection with this Court's responsibility in addressing the reprehensibility guidepost, as trial courts "have a somewhat superior vantage over courts of appeals . . . primarily with respect to issues turning on witness credibility and demeanor." *Cooper, supra*. While great care should be taken by this Court in evaluating the *BMW* guideposts, as a practical matter, this Court cannot refer to the trial transcript to refresh its recollection. Similarly, Defendants are unable to provide this Court with comprehensive citations to the trial record that might assist this Court in reaching its determination on the constitutional issues raised by the Defendants. Accordingly, as a procedural matter, the Defendants effectively are denied the right to independent judicial review by this Court of the transcript. Since this Court is in the best position to evaluate the reprehensibility *BMW* guidepost, the inability to provide citations to the record as well as this Court's inability to refresh its recollection in evaluating constitutional issues raised by the jury's verdicts violates the Defendants' procedural due process rights.

Additionally, under *BMW*, a punitive damage verdict assessed in a state court proceeding cannot take attempt to punish a Defendant's conduct outside of the state. *BMW, supra* 517 U.S. 559, 572-73(1996) ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.")("But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States... Alabama does not have the power, however, to punish

BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.") Since the punitive damage verdicts considerably exceed each Defendant's assets in Arkansas, as well as any profit generated by the Arkansas operations, under *BMW*, this Court should reduce the punitive damage verdict to limit its punishment solely to each Defendant's Arkansas assets.

* * *

Respectfully submitted,

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/s/
M. Darren O'Quinn,
Ark. Bar #87-125
and
David A. Couch,
Ark. Bar #85-033

AFFIDAVIT OF WILLIAM R. COUNCIL, III

In the Circuit Court of Polk County, Arkansas.

LON C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Plaintiff

vs.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; Diversicare Management Services Co.; Diversicare Corporation of America-Arkansas; Diversicare Corporation of America, Defendant

No. CIV-2000-5

TO BE FILED UNDER SEAL BECAUSE CONTAINS MATERIAL NON-PUBLIC INFORMATION
STATE OF TENNESSEE
COUNTY OF WILLIAMSON

State of Tennessee)
County of Williamson)
)

William R. Council, III, being first duly sworn, does hereby state:

1. I am the Principal Financial Officer of Advocat, Inc. ("Advocat"), one of the defendants in this action. Defendants Diversicare Management Services Co. ("DMS") and Diversicare Care Leasing Co. ("DLC") are wholly-owned subsidiaries of Advocat.

2. Attached hereto are financial statements as of April 30, 2001 for each of Advocat, DMS, and DLC on a non-consolidated basis. Also included in the attachment is a consolidated balance sheet for Advocat and all of its subsidiaries (including DLC and DMS) as of April 30, 2001, the most recent period for which the companies' financial statements have been completed.

3. The last publicly-filed financial statement for Advocat and its subsidiaries was Advocat's Form 10-Q for the period ended March 31, 2001, which report was filed with the Securities and Exchange Commission on May 15, 2001, a copy of which is attached.

4. Since March 31, 2001, as a result of on-going operating losses, the financial condition of each of Advocat, DMS, and DLC has continued to decline. This decline will be reflected in Advocat's consolidated financial statements for the quarter ended June 30, 2001, which will be filed with the Securities and Exchange Commission and made publicly available in July 2001.

5. As the parent holding company, Advocat has no independent business operations. All operating businesses are conducted through DMS, DLC and other subsidiary companies of Advocat.

FURTHER AFFIANT SAYETH NOT.

/s/
William R. Council, III

Advocat Inc.
Subsidiary Balance Sheet Summary
As of April 30, 2001

	Diversicare Leasing Corp.	Diversicare Management Services	Advocat Inc. Unconsolidated	Advocat Consolidated
Cash/Bank overdraft	543,392	(1,479,092)	619,722	2,476,764
Accounts receivable, net	12,573,358	2,156,095	0	15,235,685
Inventories	432,167	0	0	640,463
Prepaids	2,405,480	582,145	176,486	1,747,762
Other current assets	0			
Total current assets	15,954,397	1,259,148	796,208	20,100,674
Net property and equipment	24,181,737	559,797	264,004	63,912,826
Deferred charges	1,214	123,355	0	582,533
Deferred lease costs	2,013,272		0	2,013,272
Other non-current assets	219,627	990	568,200	3,370,159
Investment in subsidiary	1,433,955	15,374,288	8,376,445	8,841,798
	27,849,805	16,058,430	9,208,649	78,720,588
Total assets	43,804,202	17,317,578	10,004,857	98,821,262
Notes and debt payable	13,870,914	19,926,577	1,700,000	63,990,918
Trade accounts payable	3,853,016	125,873	258,417	7,468,225
Accrued expenses	13,919,058	3,683,423	942,914	18,560,652
Intercompany payable/receivable	6,784,751	(2,613,023)	10,977,098	0
Total current liabilities	38,427,739	21,122,850	13,878,429	90,019,795
Deferred gain on sale transaction	1,123,766			4,441,204
Other long term liabilities	50,968		169,958	655,834
Total long term liabilities	1,174,734	0	169,958	5,097,038
Redeemable Preferred Stock			3,434,750	3,434,750
Equity	4,201,729	(3,805,272)	(7,478,280)	268,679
Total liabilities and equity	43,804,202	17,317,578	10,004,857	98,821,262

EXCERPTS OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND REMITTITUR OR, IN THE ALTERNATIVE, A NEW TRIAL FILED JULY 20, 2001

Circuit Court of Polk County, Arkansas.

LON C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Plaintiff

vs.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; Diversicare Management Services Co.; Diversicare Corporation of America-Arkansas; Diversicare Corporation of America, Defendants

No. CIV-2000-5

* * *

Defendants state that "[at] trial no evidence was presented to show that Advocat was the alter ego of Diversicare Management Services Co. or Rich Mountain." Yet, Plaintiff has never argued an alter ego theory with respect to any Defendant. Plaintiff pleaded and proved a case of direct liability against each corporation and the jury was instructed as such. In addition, an abundance of trial evidence directly contradicts Defendants' statement. Advocat is directly liable for medical malpractice, negligence, and the wrongful death of Margaretha Sauer, and the jury was presented with much more than sufficient evidence to support each of those claims.

Defendants state that Plaintiff asked the jury to pierce the corporate veil and hold Advocat liable for the actions of its

subsidiaries. As the Court is well aware, this is not the way the claims against Advocat were presented to the jury. Ample evidence was submitted to show that Advocat was directly liable for its conduct based or, its refusal to provide Rich Mountain with the resources necessary to care for Mrs. Sauer.

* * *

DEFENDANTS' MOTION IN LIMINE ON PUNITIVE DAMAGES AND MEMORANDUM OF LAW IN SUPPORT FILED MAY 23, 2001

In the Circuit Court of Polk County, Arkansas.

LON C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Plaintiff

vs.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; Diversicare Management Services Co.; Diversicare Corporation of America-Arkansas; Diversicare Corporation of America, Defendants

No. CIV-2000-5

Defendants, by their attorneys, for their motion, state:

1. Plaintiffs' counsel has indicated that testimony on financial information related to defendants for purposes of appropriately punishing the defendants will be presented at trial.

2. Plaintiffs should be prohibited from referring to punishing the defendants or punitive damages, directly or indirectly, until such time as a *prima facia* case has been made and the court has ruled upon the issue. *Curtis v. Partain, 272 Ark. 400, 614 S.W.22 671 (1981).* Moreover, plaintiffs should be prohibited from referring to any financial information concerning the defendants since such references are prohibited in multiple defendant cases. *Id; see also Washington Gas & Light Co. v. Landsden, 172 U.S. 534 (1898); Dunaway v. Troutt, 232 Ark. 615, 339 S.W. 2d 613 (1960); Life & Casualty Insurance Co. of Tennessee v. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966).* (Plaintiff's right to submit financial worth

evidence if multiple defendants are sued for punitive damages is waived, even if the defendants are related). Moreover, Plaintiff should not be allowed to indirectly attempt to paint Defendants as large corporations capable of sustaining a large verdict by referring to its other nursing homes, business operations, or assets.

THEREFORE, premises considered, the Defendants respectfully request that their Motion in Limine be granted; their costs and attorneys fees incurred herein and all other proper relief.

Respectfully submitted

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Little Rock, AR 72201

/s/
M. Darren O'Quinn,
Ark. Bar #87-125

EXCERPTS OF DEFENDANTS' TRIAL BRIEF ON PLAINTIFFS' PROFFER OF FINANCIAL INFORMATION FOR THE PURPOSE OF PUNITIVE DAMAGES FILED JUNE 15, 2001

In the Circuit Court of Polk County, Arkansas.

LON C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Plaintiff,

vs.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; Diversicare Management Services Co.; Diversicare Corporation of America-Arkansas; Diversicare Corporation of America, Defendants,

No. CIV-2000-5

In Arkansas, punitive damages constitute a penalty against the defendant and are not compensation to the plaintiff. **See** **Warhurst v. White**, 310 Ark. 546, 552, 838 S.W.2d 350, 352 (1992). As such, they are used to deter future similar conduct by the same tortfeasor as well as other subsequent tortfeasors, not to increase the award to plaintiff. **See id**. Although the amount of damages sustained by the Plaintiff may be used as one factor in calculating the amount of punitive damages, a plaintiff is not always entitled to punitive damages. **See id**. In all actuality, punitive damages are a windfall in favor of the plaintiff. **See id.**

Since the purpose of punitive damages is to punish the tortfeasor, evidence of a defendant's financial worth may also be introduced to assist in calculating the amount of punitive damages to be assessed against the defendant. **See id**. Before such financial information may be introduced, however, the

plaintiff must present a prima facie case establishing an action for punitive damages. **See Curtis v. Partain**, 272 Ark. 400, 614 S.W.2d 671 (1981). If the plaintiff joins two or more defendants, however, it is well established that the plaintiff has effectively waived his right to introduce any evidence of the defendant's financial condition or worth. **See Life & Cas. Ins. Co. v. Padgett**, 241 Ark. 353, 407 S.W.2d 728 (1966): **see also Curtis v. Partain**, 272 Ark. 400 614 S.W.2d 671 (1981): **Dalrymple v. Fields**, 276 Ark. 185, 633 S.W.2d 362 (1982): **Missouri Pacific R.R. Co. v. Arkansas Sheriffs Boys' Ranch**, 280 Ark. 53, 655 S.W.2d 389 (1983). This rule has been found to apply even when the defendants are related. **See Padgett**, 241 Ark. at 357, 407 S.W.2d 730, (1966) (holding that no financial information on either defendant would be allowed even in a master/servant relationship).

In the landmark case of **Washington Gas Light Co. v. Lansden,** the United States Supreme Court commented on a plaintiff's entitlement to punitive damages where more than one defendant is joined. It stated:

> Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon the evidence of the

ability of one of one of the several defendants to pay them.

See Washington Gas Light Co. v. Lansden, 172 U.S. 534, 553 (1898)

Plaintiff has attempted to circumvent the above rule by claiming that Defendants are a vertically integrated series of companies which amount to but one Defendant. Nothing could be further than the truth. Each Defendant is an independently run corporation, each with articles of corporation that were filed separately. The largest of the corporations is a public company and is responsible to its shareholders, worldwide. Meanwhile, the two smaller corporations are independently owned and are not public. Each corporation does, however, honor the corporate formalities, and plaintiffs have not shown sufficient evidence to pierce their corporate veil. In Arkansas, a corporation is a legal entity, capable to sue or be sued, own property and owe corporate debts. **See Marcum v. Wengert**, 344 Ark. 153, 166, 40 S.W.3d 230, 239 (2001). Until such time as it is shown by the Plaintiffs that Defendants' corporate entities should be ignored, they remain separate entities and separate Defendants under the law and should be treated as such.

Furthermore, Plaintiffs voluntarily joined all Defendants. They could have decided to sue one of the corporations individually. Rather, they chose to join all Defendants and they should face the consequences of that decision. Therefore, financial information on any Defendant should not be introduced for the purpose of calculating punitive damages or any other purpose.

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By: /s/
M. Darren O'Quinn,
Ark. Bar #87125

EXCERPTS OF REPORTER'S TRANSCRIPT OF PROCEEDINGS OF POST-JUDGMENT HEARING ON JULY 27, 2001 ON PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF WILLIAM R. COUNCIL, III AND DEFENDANTS' MOTION FOR JNOV, NEW TRIAL OR REMITTITUR

BEFORE THE HONORABLE GAYLE FORD

* * *

BY MR. REDDICK: May it please the Court.

Judge, Plaintiff's Motion to Strike is to strike the affidavit of Mr. William R. Council, who, I believe is the chief financial officer for one of the Defendants, Advocat, Inc., the parent company, I guess. In that affidavit, they seek to introduce information of financial net worth, revenue, debt, various and sundry matters that are contained in an SEC document or SEC filing. Also, they, in this particular attachment to his affidavit, they list information concerning insurance coverage for their particular professional general liability claims. I believe it was on Page 8 through 10, a lengthy discussion in this filing about various and sundry coverage periods and umbrella policy and primary coverage policy for these types of claims that the Court heard in this jury trial.

The information that he wants to talk about, Judge, and the purpose of this particular Motion to Strike is they want to now, the Defendants want to now bring in new evidence to this Court that was strenuously objected to by Defendants during the jury trial and was ruled on by this Court. And the Court's ruling, in case the Judge has -- has forgotten, was to keep this information out regarding financial information, net worth, and other types of financial information, including, but not limited to the testimony from Mrs. Hamlett, as you will recall, the former chief financial officer, concerning the net, the worth of the beds and how we, the Judge may remember in chambers we

articulated to you or maybe at a previous hearing it was our desire to show the worth of these companies by showing the worth of the beds, because it is a basic tenet in the nursing home industry that nursing home companies are valued by their beds. That is why these beds are always listed in these filings. Why, when you talk about a nursing home company, they always say they have X-thousands of beds across the United States or across Canada, or wherever they are doing business. It is because each individual bed is a revenue source. And so we attempted to get into that information at trial, and, as His Honor recalls, you kept that information out. We attempted to take the deposition of CEO Birkett, who, in a Wall Street Journal article, and this was a topic of a hearing we had, I believe in Mt. Ida months ago, a couple of months ago, where we wanted to take his deposition and talk about this value of this company, among other things, as well, and this Court, in its discretion, decided not to let us get into that. My purpose in saying this, Judge, is the Court was very clear in keeping us from getting this information during trial at the Defendants' request. They didn't have to do that. They could have presented this information at trial. They didn't do that. And, in fact, they didn't proffer an instruction or anything to that effect. Now, what they are attempting to do, and the Court knows that Rule 59 governs this particular hearing. And what they are trying to do is they are trying to attach this affidavit, this improper affidavit and essentially inviting the Court to commit error on an issue that previously has no error. The purpose of affidavits under Rule 59 with respect to new evidence, and that is exactly what they are trying to get in is new evidence, what they are trying to get in, the proper way to get in new evidence under Rule 59 would be to attach an affidavit and it would cover various and sundry matters such as maybe testimony of a juror that some improper evidence was brought into the jury room. The Court, I'm sure, has entertained motions with those types of issues in the past. But the purpose of an affidavit is not to present information that was not presented to the jury that the Defendant had in its

possession at the time of trial. In other words, if they wanted to keep us from bringing in affidavits from other former employees, saying, well, you know, we saw Mrs. Sauer in our turning and repositioning and not only did she have one bedsore the size of a Florida grapefruit, she had ten on her. I mean this could go on and on and on. And essentially what the Defendants are attempting to do is to have a bench trial at the conclusion of a jury trial when the jury is excused and they have fulfilled their obligation, and now they are attempting to have a bench trial and introduce new evidence that was never presented to the jury. That is clearly error, Your Honor. And what they have tried to do, and the Court, even in a cursory reading of the case law as presented in the -- in the briefs, could determine this for itself, is they are attempting to say that Cooper v Leatherman, the Gore Decision, Routh Wrecker, and Edward v Stills is the two Arkansas Supreme Courts and the two U. S. Supreme Courts that have interpreted the punitive damage standard in this state and at the federal level mandates that this trial court conduct a de novo review of the evidence that is presented at trial. Now, what they didn't tell you in their briefs is that they don't cite any case, not one case federal, state level that says that in this de novo review, which, by the way, pertains to the appellate review, not the trial court, but in this de novo review that the proposition is that the Court should, in its de novo review, take in new evidence that was never presented to the jury. Not one cite. Not one argument to that effect, because it's wrong. Our case law clearly sets it out. And if you read those four cases, the Court would see that clearly for itself. And so I simply filed this Motion to Strike, because if this evidence is attached to the record, it will be error, and the reason they are attaching this evidence to the record is because it was not made a part of the record that went to the jury and they want this to go up on appeal.

And so, again, Judge, they are inviting error where there is none. And I would caution the Court at allowing this testimony or even the proffer of this testimony into the record.

The purpose of a proffer is to allow evidence that wouldn't be presented up on appeal. Presumably, he is going to testify to what is in his affidavit. There is no need to even proffer his testimony into the record today. You know, if they would have, before trial if they would have brought in this gentleman and said we want to depose him and allowed us to cross examine him, allowed us to give his testimony to our expert, then we would have allowed then - probably taken up some follow-up depositions maybe of CEO Birkett or some of the others, then that would have been permissible. But they chose, Judge, they chose to keep this information out at trial, not us, we tried to get it in. And so they shouldn't now be allowed to bring in new evidence. You know, in other words, they are asking to have their cake and eat it too. And that's wrong. That is not the purpose of Rule 59 or even de novo review.

So, Judge, just so the Court is clear on what we are requesting, we are requesting that Mr. Council should not be allowed to give testimony on any subject that was the subject of his affidavit, the affidavit should be stricken and new evidence should not be presented that was not presented to the jury.

BY THE COURT: All right.

BY MR. REDDICK: And that -- and that includes everything. You know, they -- they engaged this scare tactic with the Court and say that there is a mistrial should be granted because in our response that we mentioned, in our response to their affidavit, we mentioned insurance policies that provided, you know, a hundred-plus million dollars in coverage, and they -- they cried foul on that, even though there are three pages attached to their affidavit that -- that, you know, in a blatant attempt to--

BY THE COURT: Even though what?

BY MR. REDDICK: There are three pages attached to their affidavit as a part of that 10-Q filing. I believe it's March -- March 15, 2001 filing. It's attached to the back of Mr. Council's affidavit. There are three pages, Pages 8 through 10, I believe.

BY THE COURT: Well, let me look at that.

BY MR. REDDICK: I'll pull my copy.

BY THE COURT: I have the affidavit.

BY MR. THRAILKILL: Here's one, Your Honor. Page 10 and 11.

BY MR. REDDICK: Is that right?

Judge, Page 10 and 11 of the attachments to the affidavit, you will see where in this they discuss specifically insurance matters. There is a whole specific topic on insurance matters and they go on and on and on about professional liability and proliferation of lawsuits and the fact that they may not have enough coverage for the 2001 policy, sufficient coverage to cover their losses that they are going to incur in 2001. And then they mention the '98 and '99 policy period where they have, I believe a two and a half million dollar aggregate, or something to that effect, and they don't mention these umbrella policies. That is -- that is a deliberate attempt to mislead this Court into believing they don't have sufficient insurance coverage to cover this particular liability, and that's wrong. I'm not asking the Court to consider any insurance policies. But what I am asking the Court to do is just to strike all of this and not let it be part of the record, because that is what the Court should do in the reading of these cases and the case law. It would be again inviting error where there is none.

BY THE COURT: Let me ask you a question. If you wanted it during the trial and didn't get it, what's wrong with getting it now?

BY MR. REDDICK: Because we weren't -- the point is we weren't allowed to go into that in discovery. As I mentioned, I would have loved to have gone into this before trial, but I wasn't allowed to.

BY THE COURT: All right. Fair enough.

Mr. O'Quinn, any response to the Motion to Strike?

BY MR. O'QUINN: Yes, sir. Your Honor, Mr. Reddick is correct, we are asking the Court to undertake an independent and de novo review of the jury's punitive damage award. And the cases of Routh, BMW, Gore -- Routh is an Arkansas Supreme Court Case, BMW Gore and Cooper Industries are United States Supreme Court cases directly on point requiring an independent de novo review of the guideposts. There's three guideposts that go with those cases mandating that the Court look at the evidence and the award against those guideposts in an independent de novo review and not defer to the jury. It's a constitutional due process procedure and the protections are there in order to prevent or correct what I would call a boxcar or run-away verdict, a seventy eight million dollar verdict. That is what those cases are there for and to not do that, we think, would be error, and so we are asking the Court on the record or in writing to make a specific de novo review under those guidelines.

We objected to the introduction of the financial information at trial because there were three defendants, three separate entities, three defendants who, under the law, were entitled to have their cases tried without being tainted by the other's financial condition. The Court ruled that and that was a proper ruling under the law. Curtis v Partain, I believe was the case and some other cases that followed. But now we are asking for an independent de novo review, and in order to do that, one of the factors the Court has to take into consideration, they have to review the excessiveness of the award of punitive damages as compared to the financial worth of the defendants. If this is

going to bankrupt these defendants and put them out of business, this is a corporate death sentence, I have no doubt about that, and Mr. Council is here to testify about that today and will at least want to proffer his testimony. Your Honor, this is going to shut down fifty-something nursing homes, seven thousand employees, seven -- or eight thousand employees, I believe, about seven thousand residents throughout the country, the company cannot stand the, this verdict against it. It's going to shut them down. And that's just the truth. And I think after listening to Mr. Council the Court will believe that as well.

But that is what we are asking the Court to do in order to determine if this verdict is excessive, not only look at some other factors, like what other Courts have done in Arkansas and what other juries have done, things such as that, some of the -- some of the statutory penalties that are applicable. Those are some of the guideposts. But the big guidepost as far as the excessiveness would be you have to know -- you have to know their financial worth. Can they withstand this? Otherwise, it violates their due process rights, both, well substance of due process rights and also the Eighth Amendment rights and the cases have set forth those rights very clearly now. And it's meant, this is a safeguard that is put into the law that the United States Supreme Court and the Arkansas Supreme Court has put into the law to, sometimes juries get -- don't get it right or totally right. And it's our right to have a de novo and independent review under those cases, and that is what we are asking for.

As far as the insurance, introduction of the insurance policies, we believe that they did that on purpose to taint the Court. Insurance, number one, everybody knows you don't introduce it to the jury. It doesn't have anything to do with the amount of damages and so it also shouldn't have anything to do with whether the damages are reasonable. Insurance has nothing to do with that. Mr. Council is here, if the Court is going to go into the insurance, and testify there is not a hundred million dollars of coverage and there is not even any guaranteed

coverage. There has been no formal commitments to pay this judgment or to provide coverage for this judgment that the Defense has been provided so far. So we have no commitments to that. We're ask-- But they have tainted the Court with it. Under our procedures we only have thirty days from the date the judgment was entered to have this motion filed and have a de novo review. Now, they have kind of thrown the ink out on the snow and there is no way to get it off. They have thrown insurance coverage into this situation. If we ask for a special judge, what is a special judge going to do? He -- he didn't sit here at the trial. There is not going to be any way to get a transcript to review before the thirty day period runs. And so that is the basis for objecting to the introduction of the insurance information and requesting a mistrial or a new trial based on the fact that they deliberately and purposely brought that to the Court's attention.

They cite Page 9, 10, and I think 11 of the SEC filing. But if you look at that, Your Honor, they are talking a lot about the year 2000 and the year 2001. There is, you know, there is a little bit about January of '98 through February of '99, but it doesn't say -- it doesn't say they have insurance coverage for this claim or -- or how much it's going to cover, nothing about that. And so we just think that's inappropriate to say that we have inflicted insurance information into it, because we haven't, and the Court, I don't think you would be tainted by seeing that we had insurance in the year 2001 that obviously provides no coverage, it's an occurrence policy. This death occurred in July of '98 and earlier, or the allegations in this suit.

So that is the basis that we are asking for a new trial, that they have injected that issue into this proceeding and now we cannot get an independent de novo review.

BY MR. REDDICK: Judge, with permission, Mrs. Childers and I were going to split up some of the topics. Is it okay if some of the others speak?

BY THE COURT: Yes, sir.

BY MRS. CHILDERS: Your Honor, we are here for the Defendants' Motion for Remittitur. We are not here on appellate review of the punitive damages award. A remittitur of an award is only appropriate when the damages cannot be sustained by the evidence. Clearly, Your Honor is going to look at all of the evidence that came in at the trial to determine whether the damages awarded can be sustained by the evidence. The appellate court would -- would then conduct a de novo review by looking at all of the evidence again. All of the evidence means all of the evidence that came in at trial, not evidence that was brought in post-trial. If the appellate courts were to start looking at that, we would be conducting discovery in the appeals process. The United States Supreme Court would be dealing with discovery issues, which would be, every trial would be anew. As you know, chancery court cases are always reviewed de novo by the appellate courts in Arkansas. In those cases the Supreme Court has said over and over again new evidence cannot come in. If that were the case, every chancery court case apparently would be appealed so that they could have a new trial in front of the appellate court. That is not -- this is not appropriate.

What -- what happened here was this. The Defendant moved to keep out all of the financial information based on their position that because we had sued more than one defendant Arkansas law said that we could not get that information in. We -- we had some argument about that and you ruled that they were correct and we were not allowed to put that evidence in. That didn't prevent them from putting the evidence in. Had they wanted their financial condition taken into account by the jury in determining the punitive damages award, they could have put it in. If they had chosen to do that, we would have then had the opportunity to cross examine their witnesses, to conduct our own discovery of the finances, not just what their -- their affidavit says, we might have argued various things that have

nothing to do with net worth, but yet might be relative to a punitive damages award, and all of those things could have been considered by the jury.

The jury instruction about punitive damages, AMI 2218, has a bracketed section at the end that says, gives the jury one of the things to consider, the financial condition of the defendant. And that wasn't offered to the jury because there was no evidence or testimony about that. The defendants did not proffer that portion of the verdict form. But, clearly, the fact that that's in the model instruction indicates that the jury is supposed to consider that if it is an issue. To now have Your Honor consider that separate and apart from the jury would make no sense. The jury award was based on one thing, and then they are asking that it be altered based on something else. And I think that is entirely inappropriate.

As for the insurance information, our purpose in submitting that to the Court was simply to point out that the Defendants' attempt to kind of threaten this closure of forty nine nursing homes was a bit misleading.

BY THE COURT: What next?

BY MR. O'QUINN: Your Honor, I guess, depending on the Court's ruling, I've got Mr. Council here to testify.

BY THE COURT: Okay. You know, it appears to me that if the financial condition of these defendants is now admissible for purposes as to whether or not the companies can withstand the assessment of this verdict and judgment, would it not stand to reason that all factors of the company should be permitted to be presented as to their financial condition, including the insurance? Now, you have told me that what I do here today will destroy this company, close these nursing homes and harm these patients that are in there. I don't know if that is true or not. And I really don't think it is absolutely correct. Now, you say that the fact that -- and this bothers me. And I -- I, you know, I

-- you know, I -- that I should not, that -- that the fact that the word "insurance" was mentioned in the -- in the Plaintiffs' Motion to Strike Mr. Council's Affidavit, that the mere mention of insurance in the Response Motion has tainted the Court and that I can't be fair. Well, what is the statement that I am passing an economic death sentence on this corporation? The same thing. If one is bad, the other is as far as I'm concerned.

In addition, Mr. Council's affidavit -- Folks, I haven't even read the affidavit. I haven't had the opportunity. Page 10 of whatever the filing of this, Insurance Matters, he talks about insurance. And at the top of Page 11 he talks about insurance policy periods from January 1, 1998 through February 1, '99. I don't know, you know, for sure what all that means right now, just glancing at it. It sounds like you all have opened up insurance to me.

You all have piled this stuff in here and -- and I -- I just can't feel that I am supposed to conduct a de novo review to take new evidence - a de novo review of new evidence. I just can't believe that's what I'm supposed to do.

Let's see. If we treat this case just like the last car wreck case I had in which the plaintiffs didn't get the verdict, would not the same law apply? Should I have conducted after that case a de novo from the beginning and review that case on a motion for new trial? I can't believe that. Does Gore say that in cases against nursing homes the trial court must conduct a de novo review on a motion for new trial, take new evidence? I -- I just -- I just can't believe that. Of course, there's a lot of things that the law is not what I believe it ought to be, you know.

Now, your - Mr. O'Quinn, your Response to Motion to Strike which I received sometime after one o'clock yesterday while I had a jury trial, and today I have read all that I could. I had read some of it before today, but I had to read, I've got down here that, on Page 3, it says, "Arkansas law is clear that evidence of the defendant's financial worth is not only proper when

reviewing the excessiveness of a punitive award, but is required. The Court must conduct such a review de novo."

What court are you talking about?

BY MR. O'QUINN: Your Honor, we are saying that this Court is the first process in the review of the jury's verdict and that -- that -- that the Court should make--

BY THE COURT: You haven't answered my question.

BY MR. O'QUINN: Okay.

BY THE COURT: You tell me, on Page 3 of your Reply, "The Court must conduct such a review de novo." What a review is, that is in the last paragraph that you've got, into the second sentence, beginning with the third. What court are you talking about?

BY MR. O'QUINN: We are talking about this court, Your Honor.

BY THE COURT: Are you saying that I must conduct a, or that I have to conduct a de novo review?

BY MR. O'QUINN: That is our reading of Gore, Cooper Industries --

BY THE COURT: Where does it say that in Gore?

BY MR. O'QUINN: That we are entitled to a de novo review?

BY THE COURT: Where does it say that in Gore?

BY MR. O'QUINN: Your Honor, that is our reading of the case is that it -- it requires a de novo review.

BY THE COURT: If I read it, what am I looking for?

BY MR. O'QUINN: That in order to protect our due process rights, Fourteenth Amendment Rights and Eighth Amendment Rights you read that case law and all the records,

we think we are entitled to a de novo review, independent review of the jury verdict.

BY THE COURT: At the trial court level?

BY MR. O'QUINN: Yes, sir.

BY THE COURT: And you feel then that new evidence can be presented at that review?

BY MR. O'QUINN: Your Honor, I think that during the trial we were entitled not to introduce financial evidence because that was a proper ruling under the law. Now there is, one of the considerations in conducting your review is whether this verdict is excessive, whether it is too much punishment, and in order to do that the Court needs to know what the financial condition of this company is.

BY THE COURT: When am I required to do that?

BY MR. O'QUINN: It would have to be before the thirty days runs, Your Honor.

BY THE COURT: When is that?

BY MR. O'QUINN: August the 6th, is -- is the way I've calculated it. Maybe August the 7th, but August the 6th to be--

BY THE COURT: I would say August the 5th.

BY MR. REDDICK: Judge, just one final note. I would encourage the Court to read those cases. Nowhere in those cases does it say that the trial court is to take in evidence that was not presented to the jury. De novo doesn't mean accepting new evidence that wasn't presented to the jury. The Supreme Court doesn't -- the Supreme Court of the United States and the Supreme Court of this state does not conduct its own discovery.

BY THE COURT: I've sat in London in the English Court of Appeals where they rendered decisions and I'm positive they took new evidence, or it sure sounded like it, and I -- I've never

heard of that before. Of course, well, the appellate court can, it can appoint a magistrate to take evidence and who is to tell them they can't? I sure can't. If the Arkansas Supreme Court wanted to do it, they could.

Well, it appears to me that the financial evidence - the lack of financial evidence during the trial of the case is a trial tactic. First of all, I ruled that it couldn't be introduced because of the three separate corporations. In spite of the evidence in the case was there was a board of directors at Advocat and had three for one corporation, that the officers were the same and that something about the money being placed in one account and then funneled out from that account. And I felt that congress allows corporations to be formed, large companies do it, but allows them to do that possibly there's tax advantages to it, you know, I don't know, and I didn't have any evidence that these other corporations were formed to avoid judgments and so I said that the financial condition of the corporation was not admissible and would probably be reversible error since there were three separate corporations. I think there was a good reason for that. And I, you know, and it looks like maybe the Defendants now in hindsight might ought to have submitted that information, and now I'm asked to consider it in reducing the jury's award. In addition to that, I'm asked to not consider insurance, which, would it not go to the financial? Why have insurance?

I -- Mr. O'Quinn, I'm bothered with that. I just -- I'm really bothered with what I've seen today. It's none of my business as to how trials - tactics attorneys use during trials, as long as they, you know, stay within the bounds of ethical consideration and follow the rules of evidence. I just don't know if you can have it both ways. It's my impression you can't. Now--

BY MR. O'QUINN: Your Honor, can -- can I say something for the record?

BY THE COURT: Yes, sir, you sure can. Thank you.

BY MR. O'QUINN: If the Court is -- is perceiving us as us wanting to have it both ways, then I think we would be willing to waive an objection to the insurance information, but we would want to introduce the financial worth information. I think it is very relevant. It is going to -- I think when the Court hears it, that the Court will know that the seventy eight million dollar verdict will put this company into bankruptcy and -- and everything that goes along with that. I think that the Court will have no doubt that that's going to happen.

BY THE COURT: When would that take place?

BY MR. O'QUINN: As soon as they take the judgment and start collecting on the assets, as soon as they start garnishing accounts and--

BY THE COURT: Well, I don't have the final word here.

BY MR. O'QUINN: I think you have the final word in to making the judgment a reasonable judgment.

BY THE COURT: Well, you know what if I -- if I cut this verdict in half, you know what you will do, you will appeal to the Arkansas Supreme Court and ask them to cut it further on appeal.

BY MR. O'QUINN: I'm not sure, Your Honor. We are asking for a lot more reduction than that.

BY THE COURT: You see, now -- now what I understand -- that is what I'm saying. You wouldn't like it if it was cut in half.

BY MR. O'QUINN: Whether someone would want to appeal that, I don't know, Your Honor.

BY THE COURT: Well, I -- I don't make wagers, Mr. O'Quinn, but if I did, I would be willing to wager that you would. And I don't blame you. It's there and that's no problem.

But to stand here and tell me that I'm destroying these corporations does bother me.

Well, you know -- well, I think if the Court has been tainted by insurance, it has been as equally tainted by the dire picture of these corporations, putting people out of work, and all that.

Now, you -- I need to be on firmer ground on whether or not I have to conduct a de novo hearing on this and I don't know how to do that right at this time. So I guess I will go in my office and see if I can figure that out, and you folks can wait, or go, or do whatever you want to while I'm - because I've got to decide about Mr. Council. He is here. However, Plaintiffs, I believe, in their Response, which looks like -- or -- excuse me -- in their Motion, looks like they are wanting to take his deposition and there is no way to do that unless you do it this afternoon.

BY MR. O'QUINN: We are, we are going to take depositions, Your Honor, Wednesday.

BY MR. REDDICK: Wednesday at 5:30, Judge.

BY THE COURT: What about taking Dr. Birkett's deposition?

BY MR. O'QUINN: Your Honor, we have Mr. Council here because he is the chief financial officer of this corporation and knows about its finances and the effect --

BY THE COURT: All right.

BY MR. O'QUINN: -- that this judgment is going to have on the company.

BY THE COURT: All right. Fair enough. I was just kind of picking at you because you argued about it and I did not order you to produce him for that.

BY MR. REDDICK: And -- and, Judge, the major problems is, these depositions will not correct the fatal flaw that this

information was never presented to the jury and that is what we are here about. The jury is not going to hear any of this testimony. De novo doesn't mean new evidence.

BY THE COURT: Yes. Yes, Mr. Reddick. But without hearing that information this company will be destroyed, torn apart.

BY MR. REDDICK: I beg to differ on that, but, you know, if -- if this particular facility goes out of business for neglecting people and running concentration camp like conditions, is that a bad thing?

BY THE COURT: You're not arguing to the jury now. Okay. Well, let me see if I can make a decision on this today. How much time will be required to present Mr. Council's testimony?

BY MR. O'QUINN: Your Honor, I'm thinking like, probably like twenty minutes. It's going to be very organized and quick, thirty minutes would probably be the longest, but I'm thinking more like a twenty minute type witness.

BY THE COURT: We will take a short recess.

WHEREUPON, after the recess, the Court and Counsel were present; and the hearing resumed as follows:

BY THE COURT: Okay. I went in the office to try to take a look at the law. Now, here's what I've got, what I have here are two notebooks that were prepared by the Plaintiff. Now, in these notebooks, the big one, there is an alphabetical listing of the cases, which has what we were calling Gore, but it is BMW of North America, Inc. vs Gore. If you start looking for it, you'll never find it, if you look for Gore. Now, the other notebook is a notebook that was prepared by the Plaintiff and sent to me, and it contains, this contains all of the pleadings as to this Motion for Judgment NOV, etc. except it did not contain the Defendants' Reply, the Defendants' Response to Motion to

Strike Affidavit of William R. Council, III and Brief, which I have put in there. Now, so that you folks out there won't wonder, the quote, "Gore Case" is a United States Supreme Court case out of the State of Alabama. Now, then, I'm guessing it's twenty-five pages. Whoops, I would have lost that guess. It's forty-two pages, forty-one typewritten pages. I'm not fussing at the Defendants, but I haven't read all of this. I had a jury trial Tuesday, I was in court until seven o'clock Wednesday. And the Jury trial Tuesday and got home at ten o'clock, jury trial yesterday got through about six, I guess. Been to Mt. Ida. That's why I was late getting here today. Now, I just had to say that.

But I don't see anything in a cursory glance at what we call Gore that says that the court trial has to conduct a de novo review and I don't believe that is the law. And what I believe the Defendant wants to do, and it's obvious to me, is to argue to me about what this judgment will do to the corporation which they could have argued to the jury and did not. Now, so, I'm inclined to say, well, you know, you can't have your cake and eat it too. I will not accept responsibility for what happens to the corporation -- or corporation, because I don't have the ultimate word on it and even if I did, I don't know if I would accept the responsibility. Now, I believe that this is designed and offered to require me to make a decision on what was not available to the jury, on facts that were not argued to the jury, and I don't think that's right. But, I do want the Supreme Court to have this available if I'm wrong, if I should stop everything I'm doing for the next two weeks, or what-have-you, because that is what it looks like I will have to do and take new evidence in this case. While I never ask anyone to like a decision necessarily that I may make, I do ask them to respect it and that it's hopefully made thoughtfully with consideration and I absolutely support and defend the right of any decision I might make to be reviewed by the appropriate reviewing authority and will accept their decision if I'm wrong. Now, how can that take place?

How can I make sure that -- that I did - what I think I should do here today, yet give the defendants the right to be protected if I'm in error.

BY MR. THRAILKILL: Judge, the Affidavit of Mr. Council is attached to their motion and that should be sufficient to go up on appeal.

BY THE COURT: Well, that's -- that will take care of the insurance issue, I guess.

BY MR. THRAILKILL: It also takes into consideration the financial condition as well.

BY THE COURT: Well, you know, I have glanced through that Affidavit, and--

BY MR. O'QUINN: Your Honor, and we -- we don't agree with that statement, of course. I don't -- Mr. Council, there -- there's certain, under the BMW case there's certain--

BY THE COURT: Where? Tell me where. I want to know.

BY MR. O'QUINN: Under the -- actually, Your Honor, Cooper Industries is the case that we are saying requires the de novo review.

BY THE COURT: Well, thank you for telling me that.

BY MR. O'QUINN: It was cited in our briefs, but I -- I --

BY THE COURT: Yeah, okay.

BY MR. O'QUINN: -- might not have pointed it out. But the--

BY THE COURT: Well, okay, let's just stop here. Where does it say that in Cooper? I now have the ability to look at Cooper v Leatherman, which is a United States Supreme Court decision.

BY MS. CHILDERS: Your Honor, if you will look at Page 10 in the Cooper decision.

BY THE COURT: I guess I should have looked at it first, it's just fifteen pages long.

BY MS. CHILDERS: Down at the bottom on Footnote 12, it lists the factors that the jury was instructed to consider and includes the defendant's income and assets. So this is a -- I will agree that the Cooper case requires the appellate court to conduct a de novo review of an award pending against it. In this case the de novo review included what the jury considered which included the defendant's income and assets.

BY THE COURT: Okay. Mr. O'Quinn, I guess you are the one I was asking on that.

BY MS. CHILDERS: I apologize, Your Honor.

BY THE COURT: That's all right.

BY MS. CHILDERS: I didn't mean to interrupt.

BY THE COURT: That's all right.

BY MR. O'QUINN: Your Honor, the Cooper Industries--

BY THE COURT: Mr. O'Quinn hasn't objected.

BY MR. O'QUINN: I'm sorry. Cooper Industries, Your Honor, dealt with a single corporation as well, not three separate corporations as the Court has already ruled that these three were and we are entitled in Curtis v Partain protection. BMW, Your Honor, I will bring that to the Court's attention, BMW says that the Court shouldn't consider assets outside of the state of the judgment in determining whether the verdict is excessive, but should consider the operations -- we are saying that the Court should consider the operations in Arkansas and what this company derived and did in Arkansas, and that's what BMW is more or less cited for. And Mr. -- the point is Mr. Council's Affidavit doesn't explain that.

BY THE COURT: Well, that can be resolved very easily, can't it?

BY MR. O'QUINN: That's why we have Mr. Council here today, Your Honor, for twenty minutes of testimony.

BY THE COURT: To offer what?

BY MR. O'QUINN: To explain the --

BY THE COURT: That there --

BY MR. O'QUINN: -- the Mena operation.

BY THE COURT: -- are no assets in Arkansas?

BY MR. O'QUINN: Actually there are losses in Arkansas, major losses. There's no assets in Arkansas that--

BY THE COURT: Are you saying that a corporation from out of state can come to Arkansas and not have any -- any assets in Arkansas and it is judgment proof?

BY MR. O'QUINN: I'm saying, Your Honor, that the jury should - and the Judge doing the review should punish the defendants for their operations in Arkansas, the bad conduct that happened in Arkansas, and that is what BMW stands for. The jury in that case tried to punish them for things that were going on in other states.

BY THE COURT: Do you have any evidence that that took place here?

BY MR. O'QUINN: Yes, sir. They -- they said that we had fifty one nursing homes all over the United States and in Canada.

BY THE COURT: Was that objected to?

BY MR. O'QUINN: Yes, sir. We objected to any kind of information, and we did it, we said that they were going to try to get--

BY THE COURT: Was it objected during trial? Was there an objection on the record?

BY MR. O'QUINN: Yes, sir. We objected to the financial information or trying to back door it by -- by saying how big they were. There was a Motion in Limine filed on that.

BY THE COURT: Well, I think what happened is you would have been better off if the financial information had been introduced, but you chose not to do that.

Well, okay. Let me -- now, you have said that Leatherman was the main case. Leatherman doesn't say that the appellate court conducted de novo review and take evidence that was not before the jury; it does not say that, does it?

BY MR. O'QUINN: I believe that is correct, Your Honor, that it doesn't, doesn't address the issue one way or the other.

BY THE COURT: So that is no help to us, because the financial information was before the jury, so when the trial court conducted the review or heard the motions on that, the trial court had that same information before it. So -- well--

Now, why can't we go to the other issues? Now, any problem with that?

* * *

BY MR. O'QUINN: Yes, sir. Your Honor, I guess that was kind of the threshold issue on some of the other issues that will follow, but what I would like to talk about right now, if I could, is the Defendants' Motion for a JNOV, or in the Alternative A Remittitur, or in the Further Alternative a New Trial, and I will go through the grounds for that.

But the -- the principle thrust behind the motion is that these judgments, both the compensatory and the punitive judgments were excessive.

Secondly, Your Honor, one of the main points -- and I am not going to highlight every point, but we don't want to abandon those either. But just for purposes of this hearing, I want to give the Court the main points that we are interested in today. We are saying that the Plaintiffs are getting what amounts to a triple recovery in this case by collecting on ordinary negligence, medical malpractice and breach of contract.

Thirdly, Your Honor, I'd like to discuss the fact that there are no independent acts by Advocat or Diversicare Management that would give -- give rise to direct liability against them. This is -- the Court in effect has already ruled that these corporations are not alter-egos of each other, meaning that you can't hold one corporation responsible because another corporation did something because they were, quote, "all one". The Court has said that they were separate when the Court made the ruling that -- that -- that they are separate defendants for purposes of financial information under Curtis v Partain. And so if you -- if you have that as your ruling, and I -- and I think there is no evidence anyway that they are alter-egos, other than they shared a banking account and some of the directors were -- were -- might have been officers of one another, they were still run as separate corporations and there is no way to pierce the corporate veil, as they say. Therefore, the Court has to look for independent acts of liability. Independent acts that would give the Plaintiffs direct liability against these corporations. That is one of the points.

The fourth point, Your Honor, is that Advocat and Diversicare Management are not medical care providers. Advocat, as you know, is the parent corporation that holds these two fully owned subsidiaries. Diversicare Management, the only employee of Diversicare Management that was in that nursing home on a regular basis, I guess, would be the administrator. The administrator is not a licensed medical person and doesn't do any medical care or treatments, and so to hold that administrator and Diversicare Management liable for

malpractice, we think is inappropriate, because they are not a medical care providers, and certainly not Advocat.

Those are kind of the four areas that -- that I would like to go over, Your Honor.

BY THE COURT: Well, I have three. Did I miscount on three. Independent acts and--

BY MR. O'QUINN: Excessiveness of the verdicts, excessiveness of the compensatory and the punitives were excessive.

BY THE COURT: Okay.

BY MR. O'QUINN: And those are things that can be decided by the trial court regardless of the constitutional problems. They can be decided under our rules of procedure. Rules, I believe it's 50 and 59, as well as the case law.

But, first of all, Your Honor, I'd like to concentrate on the claims against Advocat and kind of take a look at those in light of those areas that I outlined.

The Plaintiffs don't argue -- the Plaintiffs don't argue, if you look closely at their Brief, Your Honor, they are now saying they never submitted an alter-ego theory. That they -- their lawsuit against these corporations were based on direct liability, independent acts that they did that would give liability.

So let's look at Advocat and see what independent acts that Advocat possibly could have done that would give rise to direct liability or a direct lawsuit against it.

Advocat, basically the evidence was that Advocat had final approval of the budget. The testimony of Mary Margaret Hamlett, which is undisputed, stated that the board of directors had the final budgetary approval for budgets for all the nursing home facilities in the United States of America. That was the question that was asked her on Page 35 of her deposition. She

said, "Only on a consolidated basis. They did not get into individual specifics of a particular nursing home."

So is that an independent act of negligence or direct, that could give rise to direct liability because Advocat approved a consolidated non-detailed budget that included all of the nursing homes in all of the other divisions of their fully owned subsidiaries? Is that -- is that negligence? There wasn't any evidence of what a budget should have been. There wasn't any evidence of what the budget was. There wasn't any evidence of what the actual expenditures were. There was no expert evidence saying anything about an appropriate budget. It was just all that Advocat, they approved the final budget; therefore, they are the bad people, they are the ones who did all of this and caused all of this shortstaffing. That is basically the evidence.

They refer to, in their Briefs, say, well, Advocat also was in charge of the making the policies and procedures, created policy and procedure manuals for the facility. But if you look at the deposition of Mary Margaret Hamlett that was introduced at Page 77, it says that, the question was asked: "So then these policies and procedures were prepared by employees of which company?" Answer: "Diversicare Management Services." Well, there is no evidence that Advocat was making policies and procedures that affected this facility in particular.

And, secondly, Your Honor, or thirdly, other than there wasn't any pol-- there weren't any policies and procedures by Advocat, there wasn't anything wrong with the way they approved the budget, they said, well, but Advocat also, on Page 7, they say, "undertook a duty to address the quality of care issues at Rich Mountain."

Again, go to the uncontroverted testimony of Ms. Hamlett, Page 96, and the question was: "Now, you were asked a number of specifics regarding staffing of the facilities, residents' needs and outcomes, specific facility budgets, quality of care, control issues, timely reporting, care, and the like; do you recall those

questions?" And she said, "Yes." The question was, "Who did you rely upon to give you that type of information?" Answer, "I relied upon senior vice president of Diversicare Management, Joan Verbatim, who was responsible for the nursing home operations and the staff who reported to her."

So if the Court looks at it, there is no independent acts by Advocat that give rise to direct liability. There is no alter-ego theories available to make Advocat liable for what Diversicare Management or Leasing did. So that's the, really the thrust of that argument, Your Honor.

If you look at even the budgets, and that's really the principal, I guess, act that they point to that Advocat could have done to create a direct liability situation, and their own witness, former Arkansas Vice President Mark Hemingway, testified that, the question: "Do you recall if Diversicare Management ever pressured you to reduce staff below the state requirements?" And he said, "I would agree with that," that they didn't pressure him. Question, "Do you recall that you never budgeted below the state requirements?" Answer, "I'm sure that's true." He goes on, and he says, let's talk about, I say, "let's talk about Rich Mountain in particular."

And I've cited that testimony to the Court already and I'm sure the Court recalls that basically Mr. Hemingway knew nothing at all about the specifics of Rich Mountain. He said he didn't know the amount of staff that Rich Mountain had. He didn't know how much staff that Rich Mountain needed. He didn't know the amount of staff that Rich Mountain actually had. He didn't know if the budget at Rich Mountain was adequate for the amount of staff that they needed. He didn't know if the budget at Rich Mountain for staffing was ever cut. He didn't know if the budget for Rich Mountain was ever cut for anything, other -- any, other than staff. He didn't know telling, recall telling Rich Mountain it couldn't have any more staff or supplies. And he doesn't ever recall denying a request to Rich

Mountain. That, basically, he knows nothing about Rich Mountain. And that doesn't surprise us, because, if you go further into his testimony, he says he wasn't even there for almost a year before Mrs. Sauer passed away. He left the company in July of '97, is the uncontroverted evidence, and she passed away in July of '98. So for him to know any specifics, you wouldn't think he would just because of that.

Question, "Did anything change - did anything change, Mr. Hemingway, when the facility was running smoothly and then when it began running unsmoothly, did anything change in the budgets, did you have different kits or different methodologies, or anything like that?" He said, "Nothing changed." He said, "We used the same budgeting process when it was running smooth and then when it began running unsmooth. We used the same process." "Well, what changed, Mr. Hemingway?" He said, "A long-time administrator and a long-time D.O.N., Betty Anderson, Vesta Rhodes, they -- they retired."

That's what changed, the budgets didn't change. How is Advocat negligent for approving budgets that had worked for all these years and they do it on a consolidated basis and the budgets are made by other people that have -- that are in the know? But they are holding, wanting to hold them directly liable for that.

The -- the second point on Advocat, Your Honor, is they were found guilty, five million dollars, for medical malpractice, and Advocat doesn't have a -- doesn't have anything to do with any care in this case as far as treatment or -- or any of that. So the Arkansas Medical Malpractice Act sets forth very specifically who is -- who is a medical care provider, and it doesn't include Advocat. It says people who basically, the -- the wording is it has to involve the, a medical science. That's the -- the interpretation of the law, it has to involve the, an issue of medical science.

Now, they say, well -- they say, well, the Defendants waived that requirement, Your Honor, because Defendants filed a motion for a summary judgement, partial summary judgment, and said that if this is a cause of action, if there is a cause of action here, it's for medical malpractice. And so they have turned that around and said, well, that means they are saying it must be a medical provider. And we didn't, Your Honor. We said that if there is a potential vi--viable cause of action, it is for medical malpractice. That would be the cause of action. We didn't say that everybody was admitted to be a medical care provider. They also said, well, but in Advocat's filings, and they quoted something that we filed on our Affidavit, they said in Advocat's filings, they define themselves as a medical care provider. It said, they quoted, put it in quotes and said, "The business of Advocat is to do medical care, nursing home services," something to that effect. They took out the language right after the business of Advocat and it said in parenthesis "its subsidiaries -- and its subsidiaries." They took that out. And then they said we defined ourselves as a medical care provider in our own filing, but they left out the -- the word "and its subsidiaries," because those are the ones who -- who would provide the medical care, not Advocat.

So those are the rulings there and there's some consequential actions from that. If there is no malpractice or negligence for Advocat for approving a budget, then there could -- can't be a wrongful death claim against them, because that's a derivative cause of action.

Also, Your Honor, on the issue of punitive damages against Advocat, twenty one million dollars, we're -- we're saying, number one, if there is no medical malpractice, no wrongful death, no ordinary negligence, then there is no compensatory damages that would support a punitive award. That negligence, no matter how gross it is, is not enough for of punitive damages. What malicious act did Advocat do by approving a consolidated non-detailed budget for every one of its subsidiaries, for every

nursing home in the United States that was malicious, that was, that would be evidence of malice, when those budgets were made up by the people at Diversicare Management Services who were specifically in charge of -- of running these operations and doing the budgets, and they were made up at the facility level, and they passed it up and for the final, more or less rubber stamp approval by the Board of Trustees at Advocat? So I think that's the question that must be asked.

They cite again Mark Hemingway's testimony that the staffing, that there was a cultural shift in the corporation that made them tighten down on -- on their budgets, or their money in order to increase their profits. But, again, he doesn't say anything specific about Rich Mountain. He doesn't know anything about their budgets or their staffing. But the people who did know about their budgets and their staffing, the two people in the best position to know, Mike Shepherd and Dana Bryant, the administrator and the director of nursing who did the staffing and did the recruiting and all of that, they said that they had plenty of budget, that despite their best efforts of paying bonuses, of sending people to CNA schools, other benefits, and advertising, that they had enough budget, it was they -- they could not get the people in there, Your Honor. You know, you don't just, if you've got a Medicaid rate of X-dollars per day, you don't just say, well, let's give everybody a five dollar raise and maybe that will -- maybe that will attract more people. You just, you know, they did the example of the chicken industry, that the chicken industry raised their rates and it kind of drew off some of the -- the labor pool. Well, they can, the chicken industry can raise their chicken prices and sell it for whatever the consumer is going to pay. When we are at seventy five percent Medicaid financed, we -- we can't just tell the federal government that we are going to raise our rates. They -- they do that, the federal government sets that rate. So it's -- and is it -- so is that malice because, is that some malicious act because

Advocat didn't do that? I -- I just don't see what malice that Advocat did, that committed.

Your Honor, as far as the claims against Diversicare Management, they kind of follow the same line of thought. Number one, we don't have an alter-ego theory. That's admitted by the Plaintiffs in their Brief; therefore, they must show a direct cause of action against Diversicare Management.

What did Diversicare Management do in this case? Again, they -- they, I guess they were involved in the budget approval process. Is that negligent? Is there testimony as to what the budget was, what the budget should have been, what the budget -- what the staffing was or what the staffing should have been there? There is no testimony to that at all. Really, the only testimony that -- that may lead one to look to Diversicare Management is that they provided the administrator.

What did the administrator do that was negligent that would give rise to a direct liability cause of action? Can Diversicare Management be held liable for medical malpractice? It's -- they have no medical people working for them as far as the caregivers of Mrs. Sauer. The -- the administrator was the only person working for them and he is not a licensed nurse, has no medical training, and he is the business end of the operation. The director of nurses was doing the other. All those caregivers, everybody but the administrator in the facility, are employees of Diversicare Leasing and that's -- that is undisputed. Again, if they are not guilty of negligence or malpractice, then the wrongful death claim is derivative of that.

Also, is there any evidence that, for punitive damages against Diversicare Management, another twenty one million dollars? What malicious act did Diversicare Management perform that would justify a twenty one million dollar punitive award in addition to five million dollars for ordinary negligence and ten million dollars for medical malpractice?

* * *

As far as the punitive damages award against Diversicare Leasing, Your Honor, there is no substantial evidence to support punitive damages against Diversicare Leasing. We have to look at them separately, they are not alter egos. What did Diversicare Leasing do that showed malice and ill will? Your Honor, Diversicare Leasing is the nursing home, it is the -- the caregivers at the nursing home. Plaintiffs' Counsel, in closing arguments and throughout the trial said we are not blaming the caregivers, they were doing the very best they could. They did a good job. Their own expert said, you know, they did a good job until probably the spring, around April of '98. There are two experts that said that, their own two experts. The Counsel for the Plaintiffs continually said we are not blaming the caregivers, they -- they did what, the best they could. So what did they do maliciously to cause the harm? Where is the malice and the recklessness, the ill will, things that you've got to have to have the punitive damages?

Your Honor, just for the compensatory damages in general, fifteen million dollars, I guess it, the fifteen million dollars was given solely for pain and suffering. I mean there were some medical bills of some amounts submitted, but it wasn't, you know, it was a small amount compared to the fifteen million dollars, so you can say that basically the damages in this case were based on pain and suffering damages. And -- and not to be disrespectful, Your Honor, at all, but Mrs. Sauer had a very serious and grave disease, Alzheimer's Dementia, that was in a terminal stage that everybody said was a terminal disease. And she was blind, she was, or had a bad vision problem at least, she was -- she was -- didn't know who she was a lot of times, she was laying in her bed, incontinent of the bowel and bladder, those were things that she had no -- no matter what anybody did. And now her damages are for pain and suffering, about fifteen million dollars worth, and they're -- they're saying that there's fifteen million dollars of pain and suffering for her. There was

some evidence, Your Honor, that -- that someone would see her crying sometimes or that maybe she moaned sometimes, not -- there wasn't very much of that evidence, but there was some, but is there fifteen million dollars worth of that evidence? Is it -- is it, you know, did anybody say that she was crying or moaning or hadn't taken a pain pill or anything else they want to point to on those few occasions that anybody testified to about it, did anyone say that that was because of the way someone was treating her? No one, no one testified to that. Did anyone say that that was because of her natural underlying medical conditions which were very severe? That's just speculation, Your Honor, it is pure speculation as to the price of fifteen million dollars. It's just, I think that has to be looked at. You know, why did -- why did we get these twenty one million dollars and sixty three million dollars and fifteen million dollars in compensatory damages and it's because of the atmosphere that was -- was at trial when they're saying that we are using people up like goldfish and dumping them down the toilet when we're through with them, that we're lining people up like cattle and -- and washing them off with cold water when she wasn't -- she didn't even take a shower, Your Honor, she took bed baths. That we would not answer other people's call lights, when she couldn't use her call light was the only testimony. That, you know, that she looked like she had been to Ethiopia and was a famine victim and that she had been lost in the mountains wandering around. Those types of statements are inflammatory and they create a, especially in a nursing home case, create an environment of passion, and that's why we have fifteen million dollar verdicts for pain and suffering of a terminally ill person that just, it doesn't make sense, Your Honor. And then it comes back with seventy three -- they didn't even ask for that much money. You know, it's even -- I don't understand it. I think it -- it shocked my, not only my conscious, Your Honor, it shocked me all over my whole body. It shocked my heart, stomach and everything else. I thought I was going to be physically ill. And, you know, everybody, it shocked

everybody. And fifteen million dollars and seventy, or sixty three million dollars has got to be based on something other than the evidence and some of it is speculation and some of it is passion and prejudice.

I think, again, as far as we have talked about the punitive damages, but there's a number of factors the Court has to consider, not just the financial information which, again, we want to proffer if the Court doesn't -- doesn't choose to hear it, but we do want to proffer it, because it is, it's going to be a corporate death sentence, Your Honor, it's going to put -- they are going to be -- they are going to be in bankruptcy, Chapter 11, and they are going to -- there's going to be eight thousand residents affected possibly, there's going to be seven thousand employees affected possibly. Thirteen nursing homes in Arkansas and fifty nursing homes around the United States.

The -- the -- in reviewing the punitive damages, Your Honor, and that's why I want to be -- I want to make a strong point about this, is that the standard in Arkansas and when you review the punitive damages, you have to look at the enormity of the wrong, the intent of the party committing the wrong, and then all of the circumstances around that, including financial information. The Court, I know, has that under advisement right now, but there's still other factors you get to look at besides just the intent of the parties -- I mean financial information.

Under the BMW case that we've called Gore as well, there's federal standards and BMW gives us three guideposts that have to be looked at whether the Court is doing a de novo review or not. The degree of the rep-- reprehensibility of the party, how reprehensible they are, the disparity between the harm and the punitive award, and the difference between the remedy that the jury gave and the civil penalty that would be available for that very same conduct. Three guideposts, Your Honor.

Also, did the Defendants receive fair notice that they would be doing business in Arkansas or in Polk County in particular,

was it fair notice to them that they would come and do business and there would be an unfortunate situation with Mrs. Sauer and that they would come into court and be hit with a seventy eight million dollar verdict?

That's -- that's another thing for the Court to consider, because under BMW and Gore, it says, "The elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will be subject to him as punishment but also the severity of the penalty that a state may impose."

And so how do you look at fair notice? You look around at other juries and what other juries in Arkansas have done. And we cited those cases. You look at reported cases. You know, the reported cases, hardly any of them approach the million dollar mark for wrongful death that are reported.

They -- they cite some out-of-state cases, but that misses the point. You've got to be on notice for in Arkansas. What is, if you do business in Arkansas, what are people going to do to you if they perceive that you have done something wrong in a -- in a similar situation?

They cite some settlements. The biggest verdict that they cite in Arkansas was actually, you know, after they started doing business in Arkansas anyway and after this event happened, and I think it was a twelve million dollar verdict in Wynne. And I think, you know, in all fairness, that they should tell the Court what that case actually ended up settling for, because it's not anywhere near, as I understand it, twelve million dollars. I don't know the -- know the amount, but I think it is significantly less.

The -- you can also look, Your Honor, look at the civil -- civil penalties that -- that the legislature has said, okay, if you do this conduct, then this is -- this is going to be what we think is an appropriate penalty. And that penalty in Arkansas, Your Honor, and we cited the -- the new act that was just passed, Act

1621 of 2001, and it said that if a -- a long-term care facility must subject -- must pay a civil penalty not to exceed fifty thousand dollars for the death of a resident resulting from a violation of abuse, neglect, or exploitation. The legislature says fifty thousand dollars.

Now, they come back and they argue in their Brief that, well, but there's some criminal penalties that you could be subject to, and criminal penalties, incarceration, that's -- that's serious and therefore you should know that there would be other more serious consequences than just the fifty thousand dollars. And what -- what the Gore, BMW and the Cooper case, Your Honor, say is that only, you only compare -- they specify that you only perform a comparison of the fine, not the potential for prosecution. So if you want to look at the statutes where they say, well, here's a Class D Felony for abuse of an adult and -- and whatever the fine may be, you should look at the fine, Your Honor, and none of those fines are, as I recall over the fifty thousand dollars mark. So I think that the fifty thousand dollars fine that the legislature has enacted is the -- is the benchmark and it is a lot more specific, because it talks about the death of a person in a nursing home. But it's not by accident that the -- that the BMW case and the Cooper case said that you look at the fine you pay and not really the potential for prosecution, because in a criminal case there's certain procedural safeguards that you would have that would protect you from a wrongful punishment, things that we may not have in a -- in a civil case when we are being punished. And those would be like stricter standards of evidence, possibly in a criminal case the court might not elect to let in things like survey results or talk about other residents and possibly in a criminal case where the evidence is, rules of evidence are sometimes followed more strictly or interpreted more strictly, that some of those, what we'd call extraneous things that may have some relevance to the -- the acts of the parties might not be left -- allowed in in a criminal case. So that's, it's not by accident that BMW and Cooper said we needed

to look at the fines. And if you look at the fines, there is a fifty thousand dollar fine and that's the bottom line. If you look at the multiple -- if you look at how many times the compensatory damages must be multiplied to reach the punitive damages, most of the courts are saying four to one is the appropriate. The United States Supreme Court, you know, they are using a four-to-one ratio. If you take fifty thousand dollars and divide it into twenty one million dollars, even assuming all of the Defendants are separate, I think that is four hundred and twenty times that penalty. Also, it's twelve hundred and sixty times the -- the entire--

BY THE COURT: I thought you said the ratio of the compensatory was what you were using.

BY MR. O'QUINN: Right. If you -- what I'm saying, Your Honor, is--

BY THE COURT: I want to make sure I've got my words, I heard you right.

BY MR. O'QUINN: The -- if there's fifteen minute -- fifteen million dollars in compensatory damages in their -- in their joint and several liability and you assign five million to each and twenty one million dollars to the punitive damages, there is a sixteen million dollar difference between those two awards. It's also more than four times as much. But that's assuming that the compensatory damage award is -- is reasonable.

BY THE COURT: Those two words.

BY MR. O'QUINN: Yes, sir.

BY THE COURT: That's what I wanted to make sure I understood.

BY MR. O'QUINN: That's assuming that the compensatory damage award is reasonable. If you take the fifty thousand dollar figure in the new act and say, okay, the legislature has

said this is a reasonable civil penalty for a death in a nursing home, then it's four hundred and twenty times. It goes into twenty one million four hundred and twenty times.

That's -- that's our request, Your Honor, is that the Court look at the guideposts of the BMW case and the Cooper Industries case, and we ask for a ruling, Your Honor, under, I think it's Rule 50, that we get findings of fact if we could, either on the record or in some type of letter or writing which would go through the guideposts both under the Arkansas Supreme Court case and then also under the federal cases, and we've cited all those cases in our Brief.

What we are asking for, Your Honor, in this case is we are not disagreeing that a jury could have found Diversicare Leasing guilty of medical malpractice, because those were the caregivers at the facility and they could have said they didn't do their job. There is evidence that would support that, so we are not disagreeing with that -- that verdict. We are also not disagreeing--

BY THE COURT: Which verdict?

BY MR. O'QUINN: The -- the medical malpractice verdict against Diversicare Leasing. We are disagreeing with the amount, but not the --

BY THE COURT: Yes, sir.

BY MR. O'QUINN: -- the fact that they could. Or the wrongful death verdict against Diversicare Leasing. Because, again, they were the caregivers. If the jury did find that her death was caused due to their substandard care, then -- then that could be supported in the record. What we are asking for, Your Honor, is a remittitur to fifty thousand dollars in the compensatory damages and four times that amount in the punitive damages.

BY THE COURT: And this is the first time you have mentioned this to me.

BY MR. O'QUINN: Okay. We are asking that the compensatory damages be remitted for those two verdicts to fifty thousand dollars.

BY THE COURT: What two verdicts?

BY MR. O'QUINN: The medical malpractice and the wrongful death. Well, let's start with the medical malpractice, I guess, against Diversicare Leasing. We are asking that it be remitted to fifty thousand dollars and that the punitive damages be remitted to four times that amount which is two hundred thousand dollars. We are asking that the wrongful death verdict against--

BY THE COURT: You are going to reduce this to writing?

BY MR. O'QUINN: Yes, sir.

BY THE COURT: So I don't have to make notes to make sure I've got them right.

BY MR. O'QUINN: Yes, sir.

BY THE COURT: I have to make notes to be able to remember everything.

BY MR. O'QUINN: Yes, sir. I -- I'm the same way, Your Honor. And just for the record, what we are asking for on the wrongful death verdict against Diversicare Leasing is that it be reduced to fifty thousand dollars in total. It was a hundred thousand dollars for each of the four sons in this case, some of whom, you know, all due respect, some of whom admitted that they rarely visited in the last few years that she was in the nursing home, had no real contact. We are asking that the Court give us a judgment notwithstanding the verdict on all of the other counts.

And if we can't get a remittitur down to the fifty thousand wrongful death, fifty thousand compensatory for medical malpractice, two hundred thousand punitive damages for medical malpractice, then we ask for a new trial, Your Honor, as an alternative request.

I think, unless the Court has questions of me, the rest of it is in our Brief, but I think those are the highlights.

BY THE COURT: Yeah, I do have a question. Do you want findings of fact?

BY MR. O'QUINN: Really, Your Honor, only on the--

BY THE COURT: I'm not going to make findings of fact of the trial.

BY MR. O'QUINN: I understand that, Your Honor. I mean just as far as findings -- findings under the punitive damage award only. We -- such as the -- the first Gore factor is the degree of reprehensibility and we would like findings on that. The second Gore factor is the disparity between the harm and the damage award.

BY THE COURT: The guideposts?

BY MR. O'QUINN: Yes, sir. Yes, sir.

BY THE COURT: Okay.

BY MR. O'QUINN: And then there are those guideposts under Arkansas law as well. It's double review. And those -- those guideposts are seen in the Routh Wrecker case that says--

BY THE COURT: In the what case?

BY MR. O'QUINN: The Routh or Roth -- R o u t h Wrecker.

BY THE COURT: Routh? Routh Wrecker --

BY MR. O'QUINN: Yes, sir.

BY THE COURT: -- Service v Washington?

BY MR. O'QUINN: Yes, sir. And the basis of that case says you look at the enorm-- the extent and the enormity of the wrong, the intent of the party committing the wrong, and all of the circumstances, including the financial and social condition and standing of the erring party. So I think Routh Wrecker and BMW would have, be the two cases that would have the guideposts. And that is what we're asking that the Court--

BY THE COURT: Okay.

BY MR. O'QUINN: Because if the Supreme Court has to do a de novo review, then we think that that's the appropriate way to have that reviewed.

BY THE COURT: Now, while we are on that subject and before I forget. Do you, in that request, want to make those proposed findings? I'm not asking you to do it.

BY MR. O'QUINN: We would be glad to, Your Honor.

BY THE COURT: It might expedite things.

BY MR. O'QUINN: Whatever the Court would desire.

BY THE COURT: Well, I can't ask you to make them and that's not what I'm doing.

BY MR. O'QUINN: Sure.

BY THE COURT: I just wanted to mention it before I forgot. Anything else?

BY MR. O'QUINN: That's it, Your Honor. Thank you.

BY THE COURT: Thank you, sir.

BY MR. LAZARRA: Your Honor, may I?

BY THE COURT: Mr. Lazarra.

BY MR. LAZARRA: Yes, Your Honor. May it please the Court.

Your Honor, much of what we have heard today with regard to these arguments on the Motion for New Trial and Remittitur and the Judgment Notwithstanding the Verdict has really been a rehash of the evidence that the Defendants felt the jury should have ruled upon. And just in any respect we heard a reargument of the jury argument. And I know the Court knows this, but the jury decision is now strongly favored by the law and you are supposed to view the evidence in the light most favorable to the Plaintiff in light of the fact that the jury has rendered a decision. What we need to show you is substantial evidence, that meaning evidence that there is a force and character in the evidence which compels a conclusion with reasonable certainty. And we have done that. There is sufficient evidence to do that on everything that really is at issue here. The only way that you are supposed to give them a new trial, if I understand the law correctly, is if the verdict is clearly against the preponderance of the evidence, and based on the seven or eight, nine days of testimony that was presented here, that just would not be appropriate. I'm not suggesting that you would do this, but the law clearly says that the Court should not substitute its view of the evidence for that of the jury. And there is a similar rule of law with regard to remittitur. And we cite, I think we cite these propositions of law in our Brief. A belief by the trial court that the damages are excessive is not sufficient if the award can be sustained by the evidence, which it can be in this case. I'm sure the, I know the Court will remember that this was an extremely attentive jury. We all commented from time to time on this. I don't know whether those comments ever got into the record, but you commented to us, we commented to you this was a very attentive jury. And now to do what the Defendants are here asking you to do, and that is to -- to void this award or reduce this award, this jury verdict, would -- would in effect be demeaning the verdict and the decision of these people who

devoted their two weeks here without complaint, without asking to be excused, without any of that, and -- and in many regards would be to demean the plight of Mrs. Sauer and the others similarly situated at the hands of these corporations that we maintain the evidence has shown in the light most favorable to us and otherwise was driven by a profit motive regardless of what care resulted from that. In this case we had direct testimony on that subject from Mr. Hemingway, direct testimony. The jury has spoken here. They have -- their -- their decision should be given great discretion with regards to the compensatory award and the punitive damage award. And I would respectfully suggest that this compensatory damage award was a recognition by the jury from this community that they are not going to discount, like these Defendants have done again today, they are not going to discount the pain and suffering, the humiliation, disfigurement, and all the things that go into pain and suffering, mental pain and suffering, because of someone's age or infirmities. And they are not going to discount the pain and suffering experienced by the elderly and the -- the enfeebled, the maimed. There was an instruction that said you can award damages for aggravation of preexisting conditions. They haven't pointed that out to you here or in their Brief, they just talk about the preexisting conditions. But I think that this jury award is recognition of the jury of the humiliation that comes from hunger and thirst, of being left in your own waste until it is caked and it's dried, until it makes rings, with pressure sores that developed on this lady, of the contractures, of her showing up at the hospital, like the doctor said, looking like she had been in a famine in Ethiopia. That was in the testimony. He explained what the terms meant in his report. I think these jury awards are a recognition by this jury that they are trying to effect change because the actions of these Defendants affect literally thousands of the elderly and the enfeebled. And so a large number of people are harmed by this corporate conduct, harmed during their life and harmed by putting them in the threat of death or causing their death. And

this jury simply decided that now was the time, this was the place to speak out on these subjects, and there is ample evidence to sustain that.

Now, I have prepared a general reply here to the positions taken by the Defense. But, rather than go through that, because I think that the matter has been briefed from my perspective pretty thoroughly, and I can go through really what the brief says to Your Honor, but if you have any specific areas of inquiry, I think that we are prepared collectively among us here to respond to those if the Court would just seek for me to go through with my general presentation, I'm prepared to do that, but if there's any particular areas that create any concern with you, we -- we could -- we could speak to those individually.

BY THE COURT: If you will go ahead.

BY MR. LAZARRA: Okay.

BY THE COURT: And then I'll ask the questions I feel like I need to.

BY MR. LAZARRA: Okay. And when you ask, I may ask for somebody to help me out, because we have sort of split this up.

But I'd like to start off, Your Honor, with the area of corporate liability or responsibility, first with regards to the negligence count. What we presented to this jury was that each of these companies was responsible for its own act in operating this facility. For example, Advocat was responsible for the operation of this facility because their board of directors controlled the purse strings of this facility and they controlled ultimately the budget. And, on the other hand, we presented evidence at the -- at the level of the facility, it was shortstaffed, it was short on supplies. There was ample evidence to support that.

We -- we introduced evidence through Mary Margaret Hamlett that they controlled the purse strings but really without paying any attention to the care being given at the facilities. She said in her deposition clearly, which was read to the jury, that they really didn't look at the quality assurance indicators when they were passing on this budget, when they were approving the budget. So they are taking some action that affects the home and they are taking it, we respectfully suggest, in an negligent way by not taking a look at how the -- the care that's being provided in the facility. That's one way that they acted directly to affect Mrs. Sauer.

It's also important to remember that testimony was presented to the jury that Advocat received a fee, they got money for their -- their oversight with regards to quality assurance. That was undisputed testimony that was presented. So not only did they undertake to do something, but when you undertake to take an action, with that comes a duty. They were receiving money for the oversight that they were supposed to be providing to this facility with regards to the quality assurance issue that directly affected her.

The accounts, as we know, were swept, so they utilized the money made off of Mrs. Sauer and other residents of that facility.

And with regards to the policies and procedures, we admitted into evidence, as Exhibit Number Two, the policies and procedures manual, and they say on there they are from Advocat. So the jury could consider that in the light most favorable to the Plaintiffs and -- and determine that when Mary Margaret Hamlett said that Diversified Management did the policies and procedures, that she was wrong, the policies and procedures on their on face show that they came from Advocat. So that is another way that they directly affected the care being given there. And that company was on notice of these bad surveys just like the other two companies were.

There was a survey, remember, Your Honor, in January of '97, which said that this facility was dangerously understaffed. There was another survey, in May of '98, which said that this facility was dangerously understaffed. And then, of course, Mrs. Sauer passes in -- in July of '98. So all through the last year and a half she is there, when there is testimony from her caregivers that because of staffing they can't get to her like they need to get to her, that they find her in this terrible condition, this degrading condition time and time again, that they don't have time to feed her, that they don't have time to get her water, that if you take the time she will eat. And all of the other testimony I will not go through and regurgitate to Your Honor right now.

This company, Advocat, who is overseeing the facility from the point of view of quality assurance, supposed to be, who is controlling the purse strings with regards to the budget, they are on notice, but they take no action. So there was sufficient evidence that the jury could have determined that they were negligent in the way they operated the facility and the role they played in the operation of the facility to withstand what the Defense is asking now.

And with regards to Diversified Management Services, Judge, there is a management contract. It is in evidence, in which, and we have set it out in the Brief, they specifically agreed and acknowledged that they have a duty to take, to be responsible for the managing the care given to the residents of the facility. That, in and of itself is sufficient evidence to hold them responsible for negligence.

The administrator of the facility, whose job it is, according to the regulations that were read to the jury in the instructions, has the overall job at the facility of overseeing the care that is being given there. So how can they now come and say that Diversified Management Services can't be held responsible for the negligence that affected Mrs. Sauer's care, not in light of the

fact that there is a management agreement between Diversified Management Services and Diversified Leasing that directly affects the care of the residents and not in light of the fact that the administrator, Mr. Shepherd, worked for that company.

They are arguing that the policies and procedures manual came from Diversified Management. Well, if they are right about that, then Diversified Management itself sent out the policies and procedures can be held responsible on the -- under that evidence if there is any conflict in the evidence. And they, too, of course, were on notice and had the benefit of the swept accounts.

With regards to Diversified [sic] Leasing, they held the license for the facility, all of the nursing staff there worked for them, including the director of nursing. They certainly were on notice. I don't think they made much of an argument that -- that Diversified [sic] Leasing couldn't be held responsible because there is not much of an argument you could reasonably make with regards to that regard -- with regards to that issue.

So all three of the companies who have been held responsible by the jury were done so after the jury heard ample evidence, substantial evidence from which they could have concluded that these corporations played a hand in the operation of the facility, that it was operated by each of them as though they were one company. This has nothing to do with alter-ego. This is directly having to do with their operation of the facility. And Advocat and Diversified [sic] Management cannot hide from responsibility for that now in light of the evidence produced during this two-week trial.

With regards to the question of whether Advocat or Diversified Management Services can fall under the -- the definition of a medical provider under the Medical Malpractice Act, well a medical provider deals specifically with companies that operate nursing homes.

So the argument I just gave to you, the evidence I just discussed with you certainly is -- is sufficient from which a jury could have concluded and you can conclude that Advocat, together with the other companies, just like they say in their own -- in their own annual report, SEC filing, the language in there is that Advocat, together with other companies, operates the facility. And if that's what they are doing and that is what the evidence has shown, in a light most favorable to us and otherwise, then they can't escape responsibility here by saying we are technically not a medical provider. They operated a nursing home in a fashion that I have described to you. Diversicare Management Services operated a nursing home in the -- in the manner that I have described to you, and, as such, are responsible as medical providers under the Medical Malpractice Act here in Arkansas.

From what I, the way I understand the argument as it was explained today, they are not claiming that Diversified [sic] Leasing can't be held responsible as a medical malpractice provider, they just want to reduce the damages against them which are fifteen million dollars, as decided by the jury, jointly and severally, so a jury decided that they should be individually held responsible for fifteen million, along with the joint responsibility with the other companies. They want to reduce that to fifty thousand under the theory that there was an act that went into place in 2001 which said that a company could be fined fifty thousand dollars for each occurrence. And, remember, this is not an individual occurrence case. The pain and suffering, the actions against Mrs. Sauer went on for a long, long time. The testimony was from Faye Chamberlain that in January of 1997, she wrote to President Clinton about the conditions on the hall that Mrs. Sauer was housed, and she said in there this company is too cheap to get the supplies and get the staff we need to take care of these people. So Mrs. Sauer was suffering from that all through '97 and all through '98, until her death. And that's day end, day out, being found in her own

waste, where she had been there too long, not being fed and not being properly bathed, not getting around to do the things, the simple things that needed to be done. So I -- I -- I find it somewhat disingenuous that they raise this statute which talks about individual occurrences the fine can be up to fifty thousand dollars in an attempt to reduce the compensatory award against Diversified [sic] Leasing.

I will remind, Your Honor, that introduced into evidence in this case was this survey, I've talked about it already and it gave all these companies notice, but they deliberately went forward even after they knew that they didn't have sufficient staff to meet the needs of the residents. The surveyors said thirteen out of thirteen cases that we looked at, you're not meeting their needs because you don't have enough staff, but they are still forging ahead. How do we know that? We have direct testimony from Mr. Hemingway because the survey comes out in January of '97, he leaves the company in the summer of '97 and in the meantime he said the corporate pressure just increased to increase the census and to meet the budget. He said he was getting corporate pressure constantly. He's the man, remember Your Honor, who said when I got my bonus, I tried to give it back because I knew this wasn't right that they're giving me money when we're not meeting the needs of the residents.

So, this is a situation where we have three companies, each playing a part in the operation of the home who are on notice that they are having problems, but they are forging ahead with this change in corporate policy which occurred in '96 and that is to put profits over people because that's what Mr. Hemingway said. He noticed the corporate switch from worrying about the quality of care being given to the residents. He said he started seeing it in the summer of 1996 and it continued until the time he left in '97 and we had evidence that it continued beyond that. We had evidence that it continued until the State came in two days before her death and imposed

a moratorium on the facility and took away their ability to receive Medicare benefits. The worst of the worst, according to their own nursing consultant. That's what she said that was.

So, this is record sufficient for punitive damages. This is a deliberate policy shift in '96 and going ahead with that policy shift, even in the face of red lights being put up, speeding through recklessly even in the face of the surveys telling them you are not properly staffed, you are not meeting the needs of your residents, you need to do something about this.

We had evidence with regards to staffing that in the budget, the largest cost is staffing and that the way to make profits is to raise the revenues, you raise the revenues by raising the census and you keep the costs down by keeping the staffing down. Mary Margaret Hamlett explained all that to the jury.

We have testimony from a caregiver who was in charge of marketing that she went to Mr. Shepherd in the spring of 1998 and said, I don't feel right about all this marketing because we can't meet the needs of the people we have here. All I get is complaints all day long from the families that we're not meeting the needs of the residents. I don't feel right about going out and marketing and bringing in new people and Mr. Shepherd told her, according to her testimony that he said, I don't want to hear any more complaints. I'm getting corporate pressure, keep bringing in the residents. Keep increasing the census. That is a wild train, but the wild train is not the jury verdict. The wild train is the way the corporations were operating this business.

Mary Margaret Hamlett agreed that they owed a duty to their shareholders to make a profit and she explained that you make a profit by keeping costs down and keeping revenues up.

I have already discussed with you the lack of quality assurance issues when then budget is being approved at the corporate levels.

Mr. Shepherd testified that they could not compete with the chicken industry and that's because they wouldn't give them enough money to compete. They were giving bonuses to their employees if they kept the pressure on to keep the census up.

In February of 1998, she was commended for keeping within the budget and he was telling his director of nurses, this was all evidence produced at the trial, keep a lid on spending. He sent her that memorandum just before the State came in in May of 1998, keep a lid on spending. So, that's where the pressure is coming from.

And, then of course the testimony from Mr. Hemingway went totally unrefuted, no one came from the corporation to say, we didn't have a corporate shift. Hemingway, doesn't know what he's talking about. It was unrefuted testimony of the way this company put profits over people and from that the jury could have easily reached the verdicts they reached. According to what we introduced at trial, he said the budgets were cut with regards to staffing allowances. He knew that at the corporate level. He was told that profitability was a problem with their budget. He was told he was spending too much on staffing. He was told the budget in Arkansas - he testified that the budgets in Arkansas affected the level of care rendered to the nursing homes in Arkansas. That directly relates to the testimony at this trial.

* * *

Finally, Judge, with regards to punitive damages, there was evidence introduced here that there was falsified records in her case. That they charted on her after she had been taken to the hospital to die, that they charted on her when the caregivers were not even clocked in to work and that was compelling testimony this jury heard and just based on that testimony alone, the jury could have found in the amounts they found in, based upon what this lady went through.

There was testimony from various witnesses this facility staffed up during the surveys trying to cheat the surveyors. And, the jury could have and did hear all this in the light most favorable to the Plaintiffs, used this testimony in deciding that these companies needed to be punished to deter future conduct.

There was testimony that the corporate nurse asked one of the caregivers to back date charts during these surveys and she refused to do it and then quit. That in fact, there was testimony offered that the medical director under contract to work at this facility offered to back date records during the survey. It was the last rebuttal witness that we called who overheard him offering that to the administrator and the jury heard that and that needs to be stopped. That needs to be deterred. The message needs to be sent that that kind of conduct is not appropriate. So, you have that falsification of records question that he didn't speak to at all because it's a difficult thing for the Defendants to deal with, but it's fact.

With regards to the ratios between the compensatory awards and the punitive damage awards, that is something courts look at and we cite cases in the brief in which the supreme court said that ten to one, compensatory and punitive damages would not be inappropriate.

The awards in this case, I'll remind Your Honor, jointly and severally, each company is held individually responsible for fifteen million dollars or a joint amount of fifteen million dollars. Then the compensatory damage awards are twenty-one as to each company. We suggest the proper way of looking at that is to say the compensatory damage award is fifteen million, the punitive award is twenty-one million and that ratio certainly is not out of proportion to the ratio that had been approved by the United States Supreme Court or by the courts in this country - in this state, excuse me.

One of the Arkansas cases talks about egregious and nightmarish conduct, I think it might be Gore, I'm not sure

which case it is, Your Honor, but the evidence in this case the Supreme Court will look on in the same fashion, as egregious and putting this lady in a nightmarish condition based on the testimony of the caregivers. Arkansas cases, one of them was seventy-five to one, one of them was six to one, I believe that is the evidence in this case.

* * *

With regards to punitive damages, Judge, they have suggested to you that this would be a death sentence on the corporation. Well, the corporation, any one or all three, if they have the grounds, can certainly seek the protection of bankruptcy courts, that's - that's - they can avail themselves of that if they have the grounds to, if there is no insurance coverage. So, I suggest to you that that argument really is not appropriate in light of the fact that when the trial was going on, they sought to prevent us from introducing evidence as to the financial worth of this company and they didn't introduce any evidence as to the financial worth of this company, so, they could have argued to the jury punitive damages would be a death sentence. So it would not be appropriate to reduce the punitive damages on that argument, that this would be some sort of a death sentence.

Judge, unless you have some questions, I tried to cover, I think, the main areas he covered.

* * *

BY MR. O'QUINN: We've addressed all of Mr. Lazarra's points in our brief and I know the Court can read those, so, I'm not going to, I guess bore the Court or take up the Court's time with that because I know the Court has read it, but all those points are addressed in our brief, but what I would like to say is, Your Honor, is there are protections in place under the post-trial procedures under BMW and those Cooper Industry cases that allow for the Court to look at what we consider a runaway

verdict, a seventy-eight million dollar verdict. There are protections in place and I don't think it's fair to the Defendants to just say, well, let's just let everybody appeal it, let's let the Defendant have to file bankruptcy just so that they can get a review of what we consider an unconstitutionally excessive verdict. I don't - I don't think that's what those protections are in place for. The trial court should look at it and make some determinations as well and not just say, let's let them go to bankruptcy and to have their right to appeal an unconstitutional verdict. And, I would like to proffer or to offer first the testimony of Mr. Council and then if the Court denies that, I would like to proffer it if I could.

BY THE COURT: Well, first of all let me say I agree with you, that the Court should not just hide behind the jury as well as the Court should not willfully ignore the jury. However, I must tell you neither should I have to guess one way or the other. But, if I have to guess, why not just let the jury verdict stand. So, I think if I change a jury's decision, I need to be on firm ground and have some sort of reason for it. But, I agree, I can't just say, well, the jury decided, I don't have to think about it. I may not be able to think very well, but at least I can try. I agree with you.

Now, I'm inclined to feel that I'm not going to take new evidence other than during discovery, evidence and the evidence that you would present through Mr. Council is not new discovery evidence. I believe that it was a trial tactic not to present that to the jury. You didn't argue the death sentence to the jury. I don't know if that prohibits you from arguing it now, but I'll tell you now, I'm not taking responsibility for it. If you had wanted to try this to me, of course the Plaintiff wouldn't let you and I'm awful glad that they didn't. But, in essence that's what is being done. But, I still have my responsibilities. Now, I sure would like to make everything available for the appellate court to look at and I'm not going to tell you what I'm going to do about the punitive damages right now. I'll try to do it

Monday. Of course I don't want the time to run without me doing something. You're not going to let me if you have to come to my house at midnight probably. I understand that. I understand the reasons for that.

I'm not going to declare the Arkansas Rules of Civil Procedure unconstitutional. I'm not going to do that. I don't think I can, quite frankly. You wish to present testimony of Mr. Council, well, I'm inclined to let you have your affidavit, together with the response and accept it into evidence for purposes of review. I don't think I need to take new evidence. I don't think I can because it's not in discovery. I think those two things should be enough because in it it's got the equity figures and if I'm wrong, the appellate court can say, yes, Judge, that jury verdict would be a death sentence if I don't reduce the - you know, I don't know what would not be a death sentence, what it would take to revive your company. I don't know. I presume Mr. Council would testify to that. I just don't know if that's proper or not. So, I guess I'll just stand on my decision not to take additional - not to allow the presentation of additional evidence and I think that's fair.

BY MR. O'QUINN: Your Honor, just so I can be clear for the record, you're saying that I'm not even allowed to proffer the evidence so that the appellate court could see what I was trying to offer? If that's the ruling, that's the Court's ruling. I'm not arguing.

BY THE COURT: I don't see why you can't do it without presenting testimony.

BY MR. O'QUINN: If they want to stipulate that what I read is going to be his testimony, I can do that.

BY THE COURT: Well, that was presented in his affidavit.

BY MR. O'QUINN: There's more than just his affidavit.

BY THE COURT: Oh, why didn't you present it?

BY MR. O'QUINN: Sir, because we were going to have him here at trial.

BY THE COURT: No, what you want to do is get up here and argue the death penalty and that we're destroying this corporation through Mr. Council, aren't you? That's what you want to present, is that not right?

BY MR. O'QUINN: Your Honor, that is his feelings and the company position that they cannot withstand this verdict.

BY THE COURT: Well, is that not reflected in the affidavit?

BY MR. O'QUINN: Not totally, Your Honor, and also—

BY THE COURT: ~~What is~~ left out? What did you leave out of his affidavit?

BY MR. O'QUINN: Your Honor, the specific operating history of Rich Mountain, it would take about two minutes to go through. The specific operations, what occurred in Arkansas and that's because of the BMW case and then yes, the net revenue of the corporation is in evidence, $270,000.

BY THE COURT: That's in the affidavit, is it not?

BY MR. O'QUINN: Yes, that's in evidence.

BY THE COURT: What has the history got to do with the financial condition?

BY MR. O'QUINN: Because one of the factors that the Court has to consider is the reprehensibility of their actions. What they allege is that Advocat—

BY THE COURT: I thought I just told you I did not think new evidence can be received.

BY MR. O'QUINN: And, I understand that, Your Honor, that's the Court's ruling. I'm just asking, can we put in the record in case the Court is not correct on that subject.

BY THE COURT: Mr. Reddick is just about to wear that chair out standing up and he has stood up, so go ahead.

BY MR. REDDICK: Well, Judge, I just wanted to make it clear that this is not new evidence being allowed in, this is a proffer of evidence, through the testimony, is that correct?

BY THE COURT: That's what I understand.

BY MR. REDDICK: We haven't had a chance to cross-examine him. They could have come up with this in the backroom of the courthouse before the hearing today. We've conducted no discovery, had no depositions. We don't have enough time between now and—

BY THE COURT: This is not evidence.

BY MR. REDDICK: I still think it's inviting error to allow them to proffer new evidence.

BY THE COURT: The proffer would be—

BY MR. REDDICK: New evidence.

BY THE COURT: Okay, all right. I guess what he's saying then and of course we try so hard to when we deny the admission of certain documents, we allow it to be put in so the appellate court can see what we refused to take and so, I thought that was the purpose of what you were offering. However, if I am wrong and the supreme court said, Judge, you should have taken that new testimony, new evidence well, it's already there without the Plaintiffs having the opportunity to rebut it. Now, you said you wanted to proffer it for the purpose, so that the supreme court would have it to look at. Well, they would only look at it, would they not, if I'm wrong in not receiving it as new evidence or as evidence. Then what they would do is send it back and say, Judge, you'd better take this evidence and at that time he could be deposed and take away the Plaintiff's argument that they were surprised and didn't have an opportunity to properly cross examine the giver of that evidence.

So, if I don't allow the proffer the supreme court couldn't do that. They would have to send it back and here we go again and they'll tell me I should have done it.

Now, don't you think that if I said yes, I'll take Mr. Council's testimony as evidence, they should have time to properly prepare for cross examination?

BY MR. O'QUINN: Judge, I just think—

BY THE COURT: They might want to an accountant here. I can't see why the affidavit wouldn't be enough.

BY MR. O'QUINN: Your Honor, I just want my request to be clear that I'm asking to proffer evidence on the BMW and Cooper Industries factors, guideposts in Arkansas, the guideposts under Routh Wrecker and the Court has taken the affidavit as the proffer. I would like to offer the testimony and if the Court is not going to take it, then that's the Court's ruling.

BY THE COURT: I appreciate that. I understand, but I think the danger is there and I - I think that the best thing for me to do is to not take that proffer because if that - if I'm wrong, we can still do it. If I'm wrong, we're going to be back in here anyway, I would think.

BY MR. THRAILKILL: Judge, just so we're clear, are you granting our motion to strike in this case? Do we need an order to that effect?

BY THE COURT: Well, I don't want to quite frankly, I want to look at it and I'm inclined not to grant the motion to strike, but to allow the affidavit and your response in which includes the insurance portion of it. The supreme court would have that material and I don't know what I'm going to do on punitive damages. I'm going to have to, I guess, really review. The BMW case - that and the Arkansas case, Routh Wrecker.

BY MS. CHILDERS: Judge, if I might make one quick point about the Routh Wrecker case, I just want to get this point in the record.

BY THE COURT: Go ahead.

BY MS. CHILDERS: In that case when the appellate court reviewed the different factors that Mr. O'Quinn has enumerated and in looking at the financial condition of the company, the Court looked at evidence, the type of evidence that we actually do have in the record here which had to do with the number of locations the Defendant had. There was evidence about their size separate and apart from net worth for profit or any of this other and that's what the appellate court considered in looking at whether they upheld a seventy-five to one ratio punitive damages awarded in that case. I just wanted to make that point. I think we have that kind of evidence in our record.

BY THE COURT: What I will do folks is that we'll not take any testimony today and if it's important enough and if I'm wrong, well, we'll be able to take it. I'm going to have to go over those factors. I have got to give consideration and I've got to write findings of facts. I've got to read those very closely and try to garner the facts out. Do you want to - how do you suggest that I get those findings of facts to you? Do you want to make any kind of suggestions - not now? Thank goodness for fax machines. The jury trial for Monday settled. I have some other stuff I need to do, but I can take some time off to do this now. Any suggestions on that?

BY MR. O'QUINN: Your Honor, we'd be glad to do it, what is today, Friday? We'll do it this weekend and fax it to the Court.

BY THE COURT: What are you going to fax?

BY MR. O'QUINN: Some proposed findings of fact.

BY THE COURT: Do you want to do that?

BY MR. O'QUINN: I'd want to help the Court any way the Court wants me to.

BY MR. LAZARRA: Judge, we of course will do that, too, but I'm a little bit confused on exactly what findings - finding that the appellate court is supposed to go to a de novo review?

BY THE COURT: What he's asking me to do, under the Rules of Civil Procedure I can make findings of facts in certain decisions and he's asked and you all haven't touched on that, so, I don't know if we're getting ahead of ourselves. Mr. O'Quinn has asked that when I rule on punitive damages that I make findings of fact with respect to the three guidepost elements. I presume they're the same -that's the EMW case and they're the same in the Routh - I mean, they are the same number in the Routh case, I don't know. I'll have to see.

BY MR. O'QUINN: Three or four.

BY THE COURT: Three or four.

BY MR. O'QUINN: Yes, sir.

BY THE COURT: And, I'm not sure what findings of facts they are, I guess the fact of reprehensibleness, the facts of whatever, what those three - I'll have to look—

BY MR. O'QUINN: Ratios.

BY MR. LAZARRA: Judge, I didn't understand that the trial court was supposed to do that, I think the appellate court is supposed to.

BY MR. O'QUINN: Judge, under Rule 50 of the Arkansas Rules of Civil Procedure, I believe it—

BY MR. REDDICK: It doesn't say that, it doesn't touch on that.

BY MR. O'QUINN: I can see which rule it is---

BY MR. REDDICK: I think they are inviting error where there is none.

BY THE COURT: For findings of fact on punitive damages?

BY MR. REDDICK: Judge, all the cases talk about de novo review by the appellate court. They don't touch on the trial court making a finding of fact, not one case.

BY THE COURT: Well, I have to decide whether or not to remit or whether or not to - he's asked for a Judgment NOV and for a remittitur.

BY MR. REDDICK: But, the standard is not in the findings of fact, Judge. The standard is it can be substantiated by the evidence.

BY THE COURT: I've seen that.

BY MR. O'QUINN: Your Honor, I'm sorry, I cited the wrong rule, it's Rule 52 and that's the authority we're going under only for the punitive damages issue.

BY THE COURT: Well, maybe I don't have to do findings of fact. Maybe I don't have to do findings of fact. I just - you know, we have a rule that says if a Judge makes a decision in deciding cases that the parties can request findings of fact.

BY MR. THRAILKILL: In a bench trial.

BY THE COURT: Well, it doesn't say bench trial, does it?

BY MR. THRAILKILL: We've got a jury, that's the rule, Judge.

BY THE COURT: I'm going to find it between now and Monday, Mr. Thrailkill.

BY MS. CHILDERS: We can submit - I guess we will have to assume that you are going to rule on our—

BY THE COURT: You all haven't said a word about findings of fact and never was responded to so now we're all up in the air on findings of fact.

BY MR. LAZARRA: We didn't understand the law required us to do that, but if the Court thinks that would be helpful—

BY THE COURT: I'm not going to do it if I don't have to.

BY MR. LAZARRA: Your Honor, I don't think the rules—

BY MR. THRAILKILL: You don't have to, Judge.

BY THE COURT: They tell us that - don't say any more than you have to.

BY MR. REDDICK: It's in the first sentence of Rule 52, Judge.

BY THE COURT: Well, Mr. O'Quinn?

BY MR. O'QUINN: Your Honor, we're saying the Court is the fact finder right now—

BY THE COURT: No one objected when you said that.

BY MR. O'QUINN: I know.

BY MR. REDDICK: I strenuously object now.

BY MR. O'QUINN: We're asking the Court to look at the punitive damages just under the regular rules whether it's *de novo* or not, whether it's excessive and those things and that's what we're asking for and we're asking you to put it in writing.

BY THE COURT: I am going to say this for the benefit of all trial judges. We will not make findings of fact where we don't have to because if we start that, then we won't have time to try cases. Now, you can submit anything you wish along that line if you want to. I don't have any problem with that. But, I have got to articulate somehow – the way I look at it, I don't see any basis for granting a Judgment Notwithstanding the Verdict.

I don't see any basis for granting a new trial. I believe that what took place in the trial was all primarily trial tactics and what we have argued here today mostly is what went on during the pretrial motions and if I made a mistake on the survey, I made it a long time ago and I'm willing to live with it. I'm not changing the ruling on it. I haven't seen any reason to and I still believe the notice, etc., etc.

With respect to the arguments of the attorneys during closing argument, they were not objected to and I don't see any basis to have a new trial or another judgment contrary to the one rendered by the jury because of the reference to the famine in Ethiopia or lined up like cattle. You know, if those were inflammatory, a cautionary instruction should have been given - should have been requested and those things could have been cured. The supreme court says you can and you might argue with them about it. But, I do think - I do think that I'm required to look at the punitive damages and the compensatory damages, but if you want to look - someone said awhile ago that the Supreme Court of Arkansas said something about a rule of thumb, four times compensatory would be something to look at. I figured out awhile ago if the compensatory stands would be, if you added that - if you added it, it would come up to seventy-seven million two hundred thousand dollars. I'm going to think about that. But, I guess the first thing I can do is think about the compensatory - fifty thousand dollars. I don't quite understand how I can look at it and say the jury found five million and I should say it should be fifty thousand dollars. I don't think you think I'm going to do that, but I'll give it consideration.

Now, what am I expecting to receive? Anything? Well, I hope the record is sufficient with all that I need. The fact that argument was made to the jury that the corporate officers were not present, you mentioned that in your motion. They had the opportunity to be present, it was a fact that they weren't here. Now, there was someone here. Mr. Furr sat here through all of it and he wasn't even involved. And, the other gentleman I

recognize each from sight, we spent a couple of weeks together and he was from your company.

Now, as for the alter-ego, I just feel compelled to tell you this, I'm going to mull it over and think about it and I'll try to write you something because I think I know what I'm going to do. I'm going to - I think the remittitur is the main thing I need to look at. But, if you ask me to make a decision that these were separate companies I would tell you in name only based on the testimony that was uncontradicted during trial that whatever one did, the other one was -- now, you may, you know, if you get into technicalities on that, maybe I'm wrong, but that's what it looked like. The same directors, the same officers, the board members said - former board members said we treated it as one company. That is the only evidence I have. The fact that I did not allow the - I call it net worth and I still think I'm right, the financial condition of each separate corporations was presented to the jury as assessing punitive damages, I felt like there was some reason -- something in the law that allowed them to have separate corporations and be separate and wholly owned subsidiaries, etc. And that I felt it was inviting error, as Mr. Reddick has stated today several times, to allow that to take place and that it really wasn't necessary. And that the jury could decide without that, they had enough information. And, boy, did they. I have a feeling that probably Mr. Council's affidavit was present to them, the decision might have been different, but, I don't know, but that's a part of it and that is nobody's fault. I still think it was a trial tactic and I don't think that binds me. But one way or the other that's the ruling I made and the Plaintiffs may think I'm wrong. I don't think they have anything to gripe about, but I think I'm right and I think another court will decide, but that doesn't keep me, based on the testimony I saw and heard in this case, that it's all one company. But, I'll to get you all something and if you want to furnish me anything. I presume there's ample time to ask any questions you want to

ask at this time. Thank you. Court will be adjourned, ladies and gentlemen.

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EXCERPTS OF COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS OF THE TRIAL COURT'S READING OF THE INSTRUCTIONS TO THE JURY, JUNE 22, 2001

* * *

Although there is more than one defendant in this action, it does not follow from that fact alone that if one is at fault, both are at fault. Each is entitled to a fair consideration of his own defense and is not to be adversely affected by your findings with respect to the other. The instructions and the evidence govern the case as to each defendant, insofar as they are applicable to him. To the same effect as if he were the only defendant in the action. You will decide each defendant's case separately as if each were a separate lawsuit.

* * *

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 03-160

IN THE

Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

v.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in reviewing the constitutionality of the punitive damages awards in this case, the Arkansas courts violated procedural due process by refusing to consider evidence that the defendants offered post-trial regarding their financial condition when the defendants (i) had not introduced that evidence at trial and (ii) had objected to the plaintiff's offering it.

2. Whether the remitted punitive damages award of $21 million is arbitrary and excessive in violation of due process under the constitutional analysis set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), when that analysis is properly applied.

3. Whether the Supreme Court of Arkansas's imposition of joint and several liability for the remitted punitive damages award violated the due process clause.

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STATEMENT OF THE CASE

Factual Background. This case presents one of the more squalid fact situations ever to come before this Court. While in the care of Rich Mountain Nursing and Rehabilitation Center, Margaretha Sauer was repeatedly left to lie in her own waste for such long periods of time that excrement dried to her skin and brown circles or halos of dried urine formed around her body on the sheets of her bed. She was repeatedly found to have excrement under her fingernails. She developed pressure sores on her buttocks and on her back. She developed blisters between her legs. One record notes that her blisters were bleeding. Some of these sores and blisters were as large as a softball or an adult fist and two or three centimeters deep. These sores and blisters were caused by neglect. As much as five days passed without a change of wound dressings. The sores became infected.

Mrs. Sauer also developed contractures, a painful condition in which the limbs of a person contract and lose their range of motion. Mrs. Sauer had contractures in all four limbs. She was in a fetal position. Both of her arms were drawn up, and her hands were closed. This condition is caused by neglect.

Witnesses testified that Mrs. Sauer "was always thirsty." She told one of her sons that she would probably die hungry. During the last month of her life, she lost 15 pounds without her doctor's being notified. For the last 24 to 48 hours of her life, she was given nothing to eat or drink. Upon her final hospitalization, there was a greenish, foul-smelling discharge from her vagina that had not been noticed or addressed at the nursing home.

Mrs. Sauer died "from severe malnutrition and dehydration." Pet. App. 8a. The nursing home records show that she ate everything that she was offered for breakfast on the last two days of June 1998, yet she was fed little or not at all in July 1998. She died on July 19, 1998. She could have been hydrated intravenously, but that was not done. According to one expert witness at trial, the failure to provide appropriate nutrition and hydration, which resulted in Mrs. Sauer's death, was an "outrageous deviation from the standard of care." Another expert testified that this conduct was "absolutely below the standard of care. I would call it conscious indifference."

The evidence at trial established that the neglect and ultimate death of Mrs. Sauer were caused by inadequate staffing and inadequate resources at the nursing home. Employees of the nursing home complained on many occasions about inadequate staffing, and they complained about the lack of supplies to care for the residents properly. They were told to quit complaining.

Mark Hemingway, the divisional vice president for the management company, Diversicare Management Services Company, testified that he was aware of the problems with short-staffing at the nursing home and that he discussed these problems with his supervisor, the vice president of operations. Mr. Hemingway attributed the short-staffing to a shift in corporate philosophy beginning in 1996, "when they started talking more about cost-cutting than quality." Prior to this time, Mr. Hemingway could not recall this facility's having any in-house generated bedsores. Mr. Hemingway was fired when he did not reduce staff to meet budget.

Evidence showed that the Petitioners (the "Advocat Defendants") knew that the facility was inadequately staffed and that the Office of Long-Term Care ("OLTC") of the State of Arkansas would take action if this inadequate staffing were discovered. Rather than correct the inadequate staffing, the Advocat Defendants attempted to deceive the OLTC and the families of residents. During OLTC inspections, the Advocat Defendants brought in employees from other facilities, who disappeared after the inspectors left. They placed uncertified personnel on the floors to create a false appearance that the facility was adequately staffed. They directed employees to falsify charts to make it appear that certified personnel were providing care while they were absent.

All three of the Advocat Defendants participated in the management and direction of this nursing home. Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, owned the facility and employed most of the staff. A management agreement provided that Diversicare Management had "full, exclusive control and responsibility of the management of the facility and its operations in all respects." This responsibility, according to the management agreement, included hiring and supervising staff, establishing and maintaining a system of patient care, supervising inventories, and preparing budgets. Diversicare Management prepared policies and procedures manuals to guide the facility. Diversicare Management received a management fee based on a percentage of the facility's revenue. Diversicare Management employed the facility's administrator. Diversicare Management employees instructed the facility's employees to falsify records in order to deceive the OLTC.

Both Diversicare Leasing and Diversicare Management are wholly owned by Advocat, Inc. Advocat, Inc., was paid a fee for "general oversight" of the facility. The budgets were submitted to Advocat, Inc., which instructed the personnel of Diversicare Management or Diversicare Leasing what changes needed to be made in those budgets. Advocat, Inc., implemented a program called "Continuous Quality Improvement" to direct the quality of care in the nursing home. Yet, the Advocat, Inc., board of directors approved the budget without even considering reports concerning the care of the residents or results of surveys from the OLTC. A bonus system rewarded persons who met Advocat, Inc.'s budget.

Mary Margaret Hamlett, former chief financial officer and member of the board of directors of Advocat, Inc., testified, "I can tell you from the company's perspective these were one. These were operated as if it was one company." Ms. Hamlett stated that, while Diversicare Management and Diversicare Leasing legally were separate entities, they were operated as one nursing home division of the parent company. All of the money collected from the operation of the nursing home at issue was deposited into a regional account in Nashville, Tennessee, and "used to pay bills for the whole company." Mrs. Hamlett testified by video deposition. Her exact testimony was known long before trial. Yet, her testimony was uncontradicted at trial.

Ms. Hamlett also testified, without objection, regarding the extent of the Advocat Defendants' operations. Pet. App. 18a. Still, no evidence was introduced regarding the Advocat Defendants' misconduct in states other than Arkansas or at nursing homes other than the one where Mrs. Sauer resided.

Procedural History. The Sauer Estate's complaint asked for judgment jointly and severally against the Advocat Defendants for both compensatory and punitive damages. In their answer, the Advocat Defendants objected to the determination of the amount of punitive damages based on corporate wealth, and they objected to the determination of the amount of punitive damages without bifurcating the trial. Before trial, the Sauer Estate filed a motion to bifurcate the trial pursuant to Ark. R. Civ. P. 42(b), which is substantially identical to Fed. R. Civ. P. 42(b). The Sauer Estate asked the court to bifurcate the trial so that financial information pertaining to the Advocat Defendants' net worth and the amount of punitive damages would be introduced at a second phase of the trial, only after the jury had already determined liability and the amount of compensatory damages. Contrary to the position taken in their answer, the Advocat Defendants then objected to bifurcating the trial. The Advocat Defendants also moved *in limine* to exclude evidence of their financial condition. The trial court ruled in favor of the Advocat Defendants on both motions.

Following an eight-day trial, the jury returned verdicts for compensatory damages totaling $15.425 million, as well as verdicts for punitive damages of $21 million against each of the Advocat Defendants. The Advocat Defendants filed a Motion for Judgment Notwithstanding the Verdict and Remittitur or, in the Alternative, for New Trial. They filed with their motion an affidavit of William R. Council, who was then the Advocat Defendants' chief financial officer. He now is their chief executive officer. Attached to Mr. Council's post-trial affidavit was a one-page Subsidiary Balance Sheet Summary as of April 30, 2001, with columns for Diversicare Leasing, Diversicare Management, Advocat on an unconsolidated basis, and Advocat on a consolidated

basis. Also attached was a Form 10-Q for the quarterly period ended March 31, 2001, for Advocat, Inc. This 10-Q reported Advocat, Inc.'s financial results on a consolidated basis. The notes to the consolidated financial statement included a two-page discussion of "Insurance Matters" in which the professional liability insurance available to the company and the premiums to be paid for that insurance were discussed.

The Sauer Estate moved to strike the affidavit. The Sauer Estate also filed certificates from the Advocat Defendants' liability insurance carriers and excess insurance carriers showing that the Advocat Defendants had liability coverage, including excess coverage, totaling $95 million to pay the judgments.

The trial court declined to consider the post-trial evidence offered by the Advocat Defendants because that evidence had not been introduced at trial and likewise declined to consider the post-trial evidence offered by the Sauer Estate. Based on the evidence introduced at trial, the trial court reviewed the punitive damage awards in light of each of the three factors articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and concluded that two of the three *Gore* factors had been met in this case. Pet. App. 39a-51a. The trial court declined to order a remittitur or a new trial. Thereafter, the Advocat Defendants' insurers collectively posted supersedeas bonds totaling $86,267,500.

On appeal to the Supreme Court of Arkansas, the Advocat Defendants raised one evidentiary issue,[1] two challenges to

1. The evidentiary issue related to the admission of two redacted OLTC surveys showing that the nursing home at issue was understaffed while Mrs. Sauer was a resident. As noted above, no evidence (Cont'd)

the jury instructions, challenges to the sufficiency of the evidence, and arguments that both the compensatory damage awards and the punitive damage awards were excessive. Pet. App. 1a-2a. The Supreme Court of Arkansas found that the one evidentiary challenge was without merit; ruled that no challenge to the jury instructions had been preserved and that the jury instructions were proper in any event; ruled that the challenges to the sufficiency of the evidence had been waived because the Advocat Defendants failed to renew their motion for a directed verdict at the conclusion of all the evidence; ordered a remittitur of the compensatory damages to $5.425 million[2]; and ordered a remittitur of the punitive damages to $21 million, all to be assessed jointly and severally. Pet. App. 1a-38a. The Supreme Court affirmed the trial court's decision to consider only evidence introduced at trial. Pet. App. 17a. The Advocat Defendants did not file a petition for rehearing as permitted by Rule 2-3 of the Rules of the Supreme Court of Arkansas.

(Cont'd)
was introduced of alleged misconduct by the Advocat Defendants in other states, so no issue was raised on appeal regarding evidence of misconduct in states other than Arkansas.

2. Damages totaling $425,000 were not contested on appeal. Pet. App. 9a, n. 2. The court ordered a remittitur of the remaining compensatory damages to $5 million.

REASONS FOR DENYING THE PETITION

I. THE CHALLENGE TO THE ARKANSAS PROCEDURAL RULES PRESENTS NO IMPORTANT FEDERAL QUESTION.

The linchpin of the Advocat Defendants' petition for a writ of certiorari is the assertion that the Arkansas procedural rules violate the due process clause of the Fourteenth Amendment by requiring each party to present during trial whatever evidence that party has to support its claim or defense. Apart from the argument that it is unconstitutional to require a litigant to present all evidence during trial, the Advocat Defendants have no basis for saying that the punitive damages award, as remitted, would render them insolvent because they presented no evidence on that issue during trial. Indeed, they objected to the introduction of that evidence. The Advocat Defendants recognize that this argument is essential to their petition when they say that the "principal reason that the award must be deemed constitutionally excessive is that the award would render all of the defendants insolvent – a fact that the Arkansas courts refused to consider." Petition for Writ of Certiorari at 23. No authority exists for the proposition that requiring a litigant to present all of its evidence during trial creates an issue under the due process clause nor any other provision in the United States Constitution. No conflict of authority exists on this point inasmuch as no court has ever held that requiring all evidence to be presented during trial violates the due process clause.

Arkansas provides a full array of procedural protections for defendants against whom punitive damages are sought.[3]

3. We describe the protections in effect at the time of trial. The Arkansas legislature has since enacted the Civil Justice Reform Act of 2003, Act 649 of 2003, which increases the protections beyond those described here.

Arkansas law permits the jury to be instructed that it may consider the financial condition of the defendant in arriving at the amount of punitive damages. AMI Civil 4th, 2218. The note on the use of this instruction says that it should be given only if there is evidence of a defendant's financial condition. *Id.* Here, since the Advocat Defendants objected to the introduction of evidence of their financial condition, that portion of AMI 2218 was omitted. Thus, the jury was not instructed that it could consider the Advocat Defendants' financial condition, nor did any party request such an instruction. If a plaintiff in Arkansas wishes to introduce evidence of a defendant's financial condition for the jury's consideration in arriving at the amount of punitive damages, the court must conduct a hearing to determine whether the plaintiff has proven that the evidence is sufficient to support submitting punitive damages to the jury. *Wortman v. Shipman*, 293 Ark. 253, 259-60, 737 S.W.2d 438, 442 (1987); *Curtis v. Partain*, 272 Ark. 400, 614 S.W.2d 871 (1981), *overruled on other grounds by Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993). If the defendant wishes to offer evidence of its financial condition to mitigate the amount of punitive damages, the defendant may do so. *Holmes v. Hollingsworth*, 234 Ark. 347, 352-53, 352 S.W.2d 96, 99 (1961). In a case with multiple defendants, the defendants may choose to exclude evidence of their financial condition, as the Advocat Defendants chose to do here. But they are not required to exclude that evidence. Either party may ask the court to bifurcate the trial so that evidence pertaining to the financial condition of the defendant does not taint the jury's consideration of liability or compensatory damages. Ark. R. Civ. P. 42(b); Brill, ARKANSAS LAW OF DAMAGES (3d Ed.) § 9-4. As noted, the Sauer Estate requested a bifurcated trial, but the Advocat Defendants objected.

Following trial, a defendant who believes that the punitive damage award is excessive may ask the trial court to review the punitive damage award for excessiveness and may appeal the trial court's determination. On appeal, as a matter of Arkansas common law, the Supreme Court of Arkansas reviews the issue *de novo*, considering the extent and enormity of the wrong, the intent of the party committing the wrong, all of the circumstances, and the financial and social condition and standing of the erring party. Pet. App. 16a. The federal courts have held that the Arkansas standard meets the requirements of the United States Constitution. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 779 F. Supp. 994 (W.D. Ark. 1991), *aff'd*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 511 U.S. 1115 (1994).

The Arkansas procedure is precisely the type of judicial review of the amount of a punitive damage award that this Court approved as "a well-established common-law protection" against excessive punitive damage awards in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). As this Court stated in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991), "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." No authority exists, and no good-faith argument exists, for declaring that this procedure is insufficient under the due process clause of the Fourteenth Amendment.

While *Haslip* arose from Alabama, neither *Haslip* nor any other case has ever held that the due process clause requires the other 49 states to adopt Alabama's procedure. Alabama prohibits the introduction of evidence pertaining to the defendant's financial condition during trial.

Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 836 (Ala. 1989). If a defendant believes that the punitive damage award is excessive, under Alabama procedure, that defendant may petition the court for a post-trial hearing at which evidence can be received. *Id.* at 838-39. Alabama is in a distinct minority. California, in contrast, imposes on a plaintiff the burden of introducing evidence, during trial, of a defendant's financial condition as a prerequisite to an award of punitive damages. *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991); *Chavez v. Keat*, 41 Cal. Rptr. 2d 72 (4th Dist. App. 1995). Thus, while Alabama prohibits the introduction at trial of evidence of the defendant's financial condition, California requires it.

The procedure followed in Arkansas is the procedure of the vast majority of state and federal courts. Arkansas neither prohibits nor requires the introduction of a defendant's financial condition during trial. However, if either party wishes the fact-finder to consider the defendant's financial condition, that evidence must be introduced during trial.

In *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 570-71 (8th Cir. 1998), the Eight Circuit held that, under federal law, the failure of defendants to put on evidence of their net worth at trial constituted a waiver. The Eighth Circuit affirmed the trial court in refusing to consider post-verdict affidavits of net worth. *Id.* The holding of the Eighth Circuit in *Grabinski*, like the holding of the Supreme Court of Arkansas in this case, is consistent with the great weight of authority in imposing the burden on the defendant to introduce evidence at trial to show that punitive damages should be limited due to the defendant's financial circumstances. *See Provost v. City of Newburgh*, 262 F.3d 146, 163 (2d Cir. 2001) (it is the defendant's burden to present

evidence of his limited resources if he wishes that to be considered after trial); *Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996) (the burden of presenting evidence of net worth is on the defendant); *Smith v. Lightning Bolt Prod., Inc.*, 861 F.2d 363, 373-74 (2d Cir. 1988) (defendant's failure to introduce evidence of his financial condition during trial constitutes a waiver); *Tri-Tron Intern. v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975) (the injured party is not required to introduce evidence of the misappropriator's ability to pay); *El Ranco, Inc. v. First Nat'l Bank of Nevada*, 406 F.2d 1205, 1218-19 (9th Cir. 1968) (a defendant who did not introduce evidence of his ability to pay may not argue that the amount of punitive damages will destroy him); *Laughinghouse v. Risser*, 786 F. Supp. 920, 926-27 (D. Kan. 1992) (due process does not require plaintiff to prove defendant's financial condition). Requiring the defendant to bring forward evidence to show his inability to pay is in accord both with federal case law and with general principles of allocating burdens of proof and of producing evidence. The party who controls the evidence should have the burden of producing it. The defendant who chooses to remain silent about his financial status "must now live with that choice." *Littlefield v. Mack*, 750 F. Supp. 1395, 1402 (N.D. Ill. 1990).

The majority of states agree with these federal decisions and thus with the Arkansas courts. *See Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 113 (Utah 1998) (a majority of the courts hold that a defendant must present to the jury evidence of his inability to pay a large award of punitive damages); *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 694 (Ill. App. 5th Dist. 1993) (defendant did not offer evidence of its financial status and cannot now complain of its absence); *C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1105 (Miss. 1992) (if no evidence of the net

worth of the defendant is introduced during trial, neither party may challenge on appeal the inadequacy or the excessiveness of a punitive damages award); *Nienstedt v. Wetzel*, 651 P.2d 876, 885 (Ariz. App. 1982) (a defendant may not complain of the absence of evidence of his wealth when he made no effort to introduce such evidence); *Rinaldi v. Aaron*, 314 So. 2d 762, 765 (Fla. 1975) (evidence of financial worth is admissible but is not a requisite to an award of punitive damages); *Parker v. Hoefer*, 100 A.2d 434, 447 (Vt. 1953) (the defendant may introduce evidence of his wealth to mitigate an award of punitive damages).

"[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). Likewise, the proposition that the due process clause guarantees the right to wait until after trial to introduce relevant evidence is simply indefensible. "Relevant evidence may . . . be excluded on account of a defendant's failure to comply with procedural requirements." *Id.* "The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Id.* at 43, quoting *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). The Advocat Defendants advance an argument that is "simply indefensible"; and, in doing so, they invite the Court to grant certiorari in order to engage in "a finely tuned review" of the wisdom of state procedural rules. The Court should deny the invitation.

II. THE ADVOCAT DEFENDANTS DID NOT PRESERVE THE ARGUMENT THAT THE DUE PROCESS CLAUSE REQUIRES RECEIPT OF EVIDENCE, AFTER TRIAL, ON THE DEFENDANTS' FINANCIAL CONDITION NOR THAT THE PUNITIVE DAMAGE AWARDS EXCEEDED THE DEFENDANTS' NET WORTH AND, FOR THAT REASON, VIOLATE DUE PROCESS.

In their opening brief filed in the Supreme Court of Arkansas, the Advocat Defendants noted that, under state law, the Supreme Court of Arkansas reviews punitive damages *de novo* and considers, among other things, the financial and social condition and standing of the wrongdoer. Abstract and Brief of Appellant at 490. The Advocat Defendants argued that the trial court erred by failing to consider the post-trial affidavit "*under its state-law duty* to review punitive damages for excessiveness." Abstract and Brief of Appellants at 491 (emphasis added). However, the Advocat Defendants did not argue in their opening brief that the due process clause of the Fourteenth Amendment required the trial court to consider the post-trial affidavit, nor did the Advocat Defendants argue that the due process clause prohibits a punitive damage award exceeding the defendants' net worth. Abstract and Brief of Appellants at 486-90. Hence, those arguments were waived. *Yam's Inc. v. Moore*, 319 Ark. 111, 115, 890 S.W.2d 246, 248 (1994); *John Cheeseman Trucking, Inc. v. Dougon*, 313 Ark. 229, 238, 853 S.W.2d 278, 283 (1993).

In the due process argument of their opening brief, the Advocat Defendants did argue that the punitive damages could destroy them and the entire nursing home industry in

Arkansas, but that argument was based on the assertion that "[t]hese verdicts threaten the willingness of insurance companies to write policies in Arkansas for nursing homes and this could shut down the industry." Abstract and Brief of Appellants at 489. That argument, of course, was not based on any evidence in the record. That kind of argument is more appropriate for the legislature than for the courts, and the Arkansas legislature has addressed it. Civil Justice Reform Act of 2003, Ark. Act 649 of 2003. For present purposes, however, the important point is that the argument now made by the Advocat Defendants in their petition for a writ of certiorari was addressed to the Supreme Court of Arkansas as an issue of state law, not an issue arising under the due process clause.

The opinion of the Supreme Court of Arkansas shows that the court addressed the argument regarding the post-trial affidavit as an issue of state law, not as an issue arising under the due process clause. Pet. App. 16a-26a. When the Supreme Court of Arkansas addressed this issue as one of state law but not of federal law, the court did precisely what the Advocat Defendants asked the court to do in their opening brief. Hence, the argument that the Advocat Defendants now make has not been preserved for review by this Court. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (a point not "squarely argue[d]" in the state supreme court is waived); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (there should be no doubt that the substance and nature of the federal claims were raised below in the time and manner required by state law).

III. THE PUNITIVE DAMAGE AWARDS WILL NOT RENDER THE DEFENDANTS INSOLVENT.

It was not accidental that the Advocat Defendants mentioned the potential impact of this judgment on their *insurers* in their brief filed in the Supreme Court of Arkansas. After the Advocat Defendants filed the post-trial affidavit of Mr. Council (with the one-page balance sheet and Advocat, Inc.'s 10-Q for the quarter ended March 31, 2001), the Sauer Estate filed certificates of insurance from the Advocat Defendants' liability carriers showing that the Advocat Defendants have insurance coverage exceeding $90 million available to cover the judgment in this case. Between the trial and the remittitur on appeal, in its 10Ks and 10-Qs filed with the Securities and Exchange Commission, the Advocat Defendants consistently reported that the judgment of $78.425 million would be covered by insurance pursuant to the 1997 and 1998 insurance programs.[5] Likewise, in each of those statements to shareholders and to the Securities and Exchange Commission, the Advocat Defendants reported that, based on the insurance coverage in effect at the time of the Sauer claim, the verdict amount has not been accrued as a liability on the company's books. After the Supreme Court of Arkansas ordered a remittitur of the total judgment to $26.425 million, Advocat, Inc., reported that the reduced

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4. Arkansas law permits an insurer to indemnify an insured for punitive damages. *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

5. *See* Advocat, Inc.'s 10K for year end 2001, p. 2; Advocat, Inc.'s 10K for year end 2002, p. 3; Advocat, Inc.'s 10-Q for quarter ended March 31, 2002, p. 19; Advocat, Inc.'s 10-Q for quarter ended September 30, 2002, p. 12. All of these documents are publicly available at *www.sec.gov*.

amount was within the company's insurance coverage.[6] Moreover, on August 13, 2003 – two weeks after the Advocat Defendants filed their Petition for a Writ of Certiorari in this Court – Advocat, Inc., filed its 10-Q for the quarter ended June 30, 2003, and reported:

> On June 22, 2001, a jury in Mena, Arkansas issued a verdict in a professional liability lawsuit against the Company totaling $78.425 million. The Company appealed this verdict to the Arkansas Supreme Court in a hearing that took place March 13, 2003. On May 1, 2003, the Arkansas Supreme Court issued a decision on the Company's appeal, reducing the damages to $26.425 million, plus interest from the date of the original verdict. The Company is presently seeking to obtain review of the appellate court's judgment by the United States Supreme Court. If the reduced judgment is upheld, the Company believes the settlement amount will be within the Company's insurance coverage.[7]

Hence, after the Advocat Defendants filed their petition stating to this Court that the judgment, even as remitted, was far in excess of their ability to pay and would render them insolvent, they reported to the SEC that the judgment will be covered by insurance.

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6. *See* Advocat, Inc.'s 10-Q for quarter ended March 31, 2003.

7. Advocat, Inc.'s 10-Q for quarter ended June 30, 2003, p. 11. As noted above, the insurers collectively have posted bonds totaling more than $86 million to supersede the judgment.

"The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab." *Kemezy*, 79 F.3d at 37; *Hall*, 959 P.2d at 113 n.7. "It would be entirely inappropriate for a defendant to raise the issue of his limited financial resources if there existed an indemnity agreement placing the burden of paying the award on someone else's shoulders." *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997). *See also Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 910 (W. Va. 1991); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 38-39 (Tex. 1998). In evaluating a defendant's argument about the excessiveness of punitive damages, it is appropriate for a court to consider statements by the defendant to shareholders and to the SEC that the judgment will not have a material adverse effect on the company's financial position. *Malone*, 972 S.W.2d at 53.

The Sauer Estate raises these issues because Rule 15.2 requires that briefs in opposition point out to the Court "any perceived misstatement made in the petition." In this instance, the Advocat Defendants' petition repeatedly states that the judgment, as remitted, threatens to destroy them financially. Indeed, the Advocat Defendants say that this is the "principal reason that the award must be deemed constitutionally excessive." Petition for Writ of Certiorari at 23. These statements are untrue. They are contrary to what the Advocat Defendants have reported to their shareholders and to the Securities and Exchange Commission.

IV. NO IMPORTANT FEDERAL QUESTION IS RAISED BY THE FINDING THAT THE ADVOCAT DEFENDANTS OPERATED AS ONE BUSINESS AND THE CONCOMITANT IMPOSITION OF JOINT AND SEVERAL LIABILITY.

Prior to trial, the Advocat Defendants submitted jury instructions that treated all three of them as a single entity. They submitted a verdict form for a general verdict against "the defendants" without distinguishing among them. At trial, by video deposition, the former chief financial officer of the Advocat Defendants testified that the Advocat Defendants were operated as one business and that they commingled their funds, paying bills for "the whole company" from a single account. Although an Arkansas model instruction, which was given in this case, instructs the jury to consider each defendant's case separately, the Advocat Defendants did not request the instruction. At trial, the Advocat Defendants were content to allow the case to go to the jury with instructions that treated all of the Advocat Defendants as one. On appeal, they contended that the jury instructions erroneously treated the Advocat Defendants as one, but the Supreme Court of Arkansas noted that the Advocat Defendants had not so objected at trial. Pet. App. 33a-38a. Specifically with reference to the punitive damage instruction, the Advocat Defendants argued "the punitive damages instruction, a modified version of AMI 2218, erroneously permitted the jury to punish all three defendants for the conduct of only one. . . . Although there was no objection to the form of this instruction, it was clear error." Abstract and Brief of Appellants at 488. Arkansas does not have a plain error rule. *Stacks v. Jones*, 323 Ark. 643, 646-47, 916 S.W.2d 120, 122 (1996).

In ruling, post-trial, on whether the punitive damages were excessive, the trial court expressly found that the Advocat Defendants were operated as one business. That the trial court so found cannot create any due process issues since the finding was based on uncontradicted evidence. *Cf. Haslip*, 499 U.S. at 14. Moreover, since the trial court made that finding, the Advocat Defendants had ample notice that this was an issue to be addressed in their brief on appeal, and, indeed, they did address the issue at some length. Abstract and Brief of Appellants at 488, 492-96. Nevertheless, the Supreme Court of Arkansas, upon *de novo* review of the *Gore* factors, also held that the Advocat Defendants operated as one company. The Advocat Defendants asked the Supreme Court of Arkansas to review the record *de novo* in determining the amount of punitive damages was excessive, and the court did so. The complaint by the Advocat Defendants that the Supreme Court of Arkansas "made its own determination that the defendants shall be treated as a single entity for purposes of the *Gore* analysis"[8] comes with ill grace since the Advocat Defendants urged the court to engage in a *de novo* review. The finding that the Advocat Defendants were operated as one company is not a decision of any important federal question and therefore does not create any basis for certiorari.

Nor does the imposition of joint and several liability, on the facts of this case, create any important federal question. Whether, or under what circumstances, to impose joint and several liability for punitive damages is a matter of state law. Some states permit the imposition of joint and several liability for punitive damages, but others do not. The rule in the District of Columbia, for example, is that persons who jointly participate in wrongful conduct may be jointly and severally

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8. Petition for Writ of Certiorari at 9.

liable for punitive damages. *Jemison v. Nat'l Baptist Convention, U.S.A., Inc.*, 720 A.2d 275, 286 (D.C. 1998). The federal courts sometimes impose joint and several liability for punitive damages. *Vincente v. Obenover*, 736 F. Supp. 679, 696 (E.D. Va. 1990). The Arkansas cases long before this one permitted joint tortfeasors to be jointly and severally liable for punitive damages. *Mo. Pac. R. Co. v. Ark. Sheriff's Boys' Ranch*, 280 Ark. 53, 59, 655 S.W.2d 389, 392 (1983). No authority exists for the proposition that the decision whether to impose joint and several liability on joint tortfeasors is an important federal question.

In truth, the Advocat Defendants' arguments on this point are rehashed versions of their arguments below that the evidence was insufficient to find Diversicare Management Services Company and Advocat, Inc., liable for negligence or medical malpractice. Abstract and Brief of Appellants at 492-96. The Supreme Court of Arkansas held that the Advocat Defendants waived their challenge to the sufficiency of the evidence by not renewing their motion for a directed verdict at the close of all the evidence. Pet. App. 15a-16a, 28a-29a. Now, the Advocat Defendants have dusted off those waived arguments and presented them as arguments addressing the amount of punitive damages. However, it is not open to this Court to decide whether Advocat, Inc., or Diversicare Management caused the death of Mrs. Sauer. Nor may the Court decide whether these companies engaged in conduct worthy of punishment. Those avenues are closed because the Advocat Defendants waived their challenges to the sufficiency of the evidence.

Here, applying state law, the Supreme Court of Arkansas held that the Advocat Defendants should be jointly and severally liable for both compensatory damages and punitive

damages. Although the Advocat Defendants were entitled to bring this alleged error in state law to the attention of the Supreme Court of Arkansas through a petition for rehearing, they chose not to do so. Since this is a matter of state law, the appropriate forum for redress, other than through the Arkansas courts, is through the Arkansas legislature. *Cf. Bankers Life*, 486 U.S. at 79-80 (review should not be granted where it might short-circuit less intrusive or more appropriate resolutions, such as action by the state legislature). Earlier this year, the Arkansas legislature enacted a statute that, with very limited exceptions, prohibits the imposition of joint and several liability in actions for personal injury, medical injury, property damage, or wrongful death. Civil Justice Reform Act of 2003, § 1(a). No reason exists for this Court to grant certiorari to federalize a rule that has now been codified by the Arkansas legislature.

V. CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE ADVOCAT DEFENDANTS' REMAINING ARGUMENTS BECAUSE THEY ARGUE NO MORE THAN THAT THE SUPREME COURT MISAPPLIED WHILE PROPERLY STATING THE *GORE* FACTORS.

Almost as an afterthought, the Advocat Defendants devote a small portion of their petition to an argument the gist of which is that the Supreme Court of Arkansas properly stated the *Gore* factors but improperly applied them. That argument presents no basis for granting certiorari in this case.

The Supreme Court of Arkansas carefully considered each of the *Gore* factors, as the opinion of the court shows. Pet. App. 19a-26a. The court also considered this Court's

decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), which was rendered three weeks before the decision of the Supreme Court of Arkansas was rendered in this case. Pet. App. 20a. The court found that the reprehensibility of the Advocat Defendants' conduct in this case was high. *Id.* at 21a-22a. The Advocat Defendants' only argument regarding reprehensibility goes back to the issue of treating them as one business, as the undisputed testimony of their own chief financial officer showed them to be. Otherwise, they make no argument to show that the Supreme Court erred in finding the reprehensibility of their conduct to be high. Indeed, the fact that they are foreclosed from arguing that they did nothing to cause the death of Mrs. Sauer, coupled with the fact that they were foreclosed from arguing that their conduct was insufficiently reprehensible to warrant punitive damages, means that they have no available argument with which to deny that the reprehensibility of their conduct was high. In light of the jury instruction on punitive damages, the fact that the jury found the Advocat Defendants (and each of them) liable for punitive damages means that the jury found that they (and each of them) knew or should have known that their conduct would naturally and probably result in injury and that they (and each of them) continued such conduct in reckless disregard of the consequences. Hence, unlike BMW and unlike State Farm, the Advocat Defendants evinced indifference to or reckless disregard for the health and safety of others. *Cf. State Farm*, 123 S. Ct. at 1521; *Gore*, 517 U.S. at 576. Obviously, the harm to Mrs. Sauer was not purely economic; it was incalculably worse. As the trial court stated, there can be no comparison between *Gore* and this case. Pet. App. 42a. Nor can there be any comparison between *State Farm* and this case. In *State Farm*, the harm "arose from a transaction in the economic

realm, not from some physical assault or trauma; there were no physical injuries[.]" 123 S. Ct. at 1524-25. Here, a woman died from severe malnutrition and dehydration. Pet. App. 8a.

As to the second *Gore* factor, the ratio of punitive damages to compensatory damages is $21 million to $5.425 million, or approximately 4:1. Obviously, that ratio is consistent with the precedents of this Court. *State Farm*, 123 S. Ct. at 1524; *TXO*, 509 U.S. at 460-62; *Haslip*, 499 U.S. at 23. Oddly enough, the Advocat Defendants contend that, since the victim in this case underwent considerable physical pain and suffering, the ratio of punitive damages to compensatory damages should be lower than in cases such as *Gore* and *State Farm*, where the damages were purely economic in nature. That argument turns the prior rulings of this Court upside down, but it is consistent with the Advocat Defendants' repeated arguments throughout this litigation that substantial punitive damages should not be imposed for starving an elderly woman to death.

As to the comparison between the punitive damage award and comparable penalties, the Advocat Defendants ignore the fact that the State of Arkansas has given notice that conduct of the sort proven at the trial of this case is a felony (or perhaps many felonies) that could result in not only fines and civil penalties but also extended terms of imprisonment. Pet. App. 23a-25a. *Cf. Gore*, 517 U.S. at 583; *Haslip*, 499 U.S. at 23. Ample notice was given that severe sanctions could be imposed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 03-160

IN THE

Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

v.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Advocat, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock. Advocat, Inc., is the parent company and sole shareholder of both Petitioner Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Petitioner Diversicare Management Services Company.

Respondent Lon C. Sauer is an individual and administrator of the Estate of Margaretha Sauer, deceased.

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The Arkansas Supreme Court's rulings as to punitive damages in this case present important constitutional questions regarding the application of the *Gore* guideposts in multi-defendant cases, the imposition of joint and several liability, and the due process requirements for post-trial proceedings, in particular where evidence crucial to a trial court's post-verdict determination of the constitutional excessiveness of a punitive damages award has been excluded from trial as unfairly prejudicial. Plaintiff mischaracterizes these issues as issues of jury instructions or sufficiency of the evidence. Contrary to Plaintiff's contentions, these issues address the constitutional standards for post-trial and appellate review of punitive damages awards. These issues go to the heart of the constitutional limitations on punitive damages and warrant review by this Court.

I. The Arkansas Courts' Refusal to Consider Evidence Submitted Post-Trial Regarding Defendants' Financial Conditions Deprived Defendants of a Constitutionally Adequate Review of their Due Process Challenge to the Punitive Damages Award

A. Under *Mathews v. Eldridge*, Due Process Mandated a Post-Trial Evidentiary Hearing

In opposing certiorari, Plaintiff does not address the three-part due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that test, the Arkansas courts' refusal to consider evidence submitted post-trial of defendants' financial conditions violated due process. *See* Pet. at 16-19. Plaintiff in its opposition does not claim that a limited post-trial evidentiary hearing such as that sought by defendants would be burdensome for the Arkansas courts. Nor does Plaintiff deny that the defendants' interest in such a hearing is substantial, and that such a hearing would protect against excessive and destructive punitive damages awards, such as that imposed in the instant case.[1]

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[1] Contrary to Plaintiff's contention (Opp. at 14-15), the federal constitutional issues raised by the trial court's refusal to consider evidence post-trial regarding the defendants' financial positions were briefed by defendants before the Arkansas Supreme Court and fully preserved. *See, e.g.*, Abstract and Br. of Defendants-Appellants at 491 ("By disregarding the affidavit (ADD-13), the trial court had no basis on which to review the financial standing of defendants. The punitive damages . . . violate rights

(continued...)

In asserting that there was no constitutional necessity for a post-trial evidentiary hearing, Plaintiff proffers an irrelevant list of Arkansas "procedural protections." *See* Opp. at 8-9. Those "procedural protections" do nothing to remedy the constitutional deficiencies caused by the refusal of the Arkansas courts to consider evidence of defendants' financial conditions. Plaintiff also relies upon judicial decisions that do not address the essential issues presented by the failure of the Arkansas courts to consider such evidence. None of the decisions cited by Plaintiff (Opp. at 11-13) addresses the need for a post-trial hearing where defendants' financial evidence has been excluded from the trial as unfairly prejudicial. None of those decisions considers the constitutional issues raised in such circumstances by a court's refusal to receive evidence that a punitive award exceeds the defendants' net worth. Plaintiff's contention that "no court has ever held that requiring all evidence to be presented during trial violates the due process clause" (Opp. at 8) not only misstates the specific issue here, but also disregards the decisions cited and discussed in defendants' petition that require or approve a post-trial evidentiary hearing on issues (including defendants' financial positions) relevant to the constitutional excessiveness review of a punitive damages award. *See* Pet. at 15-16, 18.

B. Plaintiff's Contentions Regarding Insurance Coverage Do Not Obviate the Constitutional Necessity for a Post-Trial Evidentiary Hearing in this Case

Plaintiff's contentions as to insurance coverage for the punitive damages award in this case have no bearing on the constitutional issues raised by the refusal of the Arkansas courts to consider evidence of the defendants' financial conditions. As courts across the country have held, evidence of insurance coverage is irrelevant in determining whether a punitive

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[1](...continued)
of these defendants guaranteed by the . . . United States Constitution[]."); *id.* at 489 ("Due process does not allow a state to exceed the scope of its legitimate interests in punishing a particular defendant through assessing punitive damages. *BMW of North America*, 517 U.S. at 568. Yet the punitive damages in this case alone have the potential . . . to destroy [defendants]"); Reply Br. of Defendants-Appellants at 7-10 (arguing that this Court's constitutional punitive damages jurisprudence dictated a post-trial evidentiary hearing).

award should be reduced because of a defendant's limited financial resources. Moreover, assuming that insurance is relevant, due process entitled defendants to show at a post-trial hearing that the punitive award could have a devastating effect on defendants even if the award is paid by insurance and that the award thus exceeded any legitimate Arkansas interest in punishment and deterrence.

i. Insurance Coverage Is Irrelevant to the Constitutional Propriety of a Punitive Damages Award in Relation to a Defendant's Wealth

In examining the propriety of a punitive damages award in relation to a defendant's net worth, numerous courts have refused to consider whether or not a defendant had insurance that might cover the award. The conclusion of these courts that the level of a defendant's insurance is not relevant to punitive damages is based on deeply rooted constitutional and common-law principles of proportionality and legitimate state interest. These principles require mitigation of a punitive award in relation to the defendant's financial condition, not the financial condition of his insurer. In *Liberatore v. Thompson*, 760 P.2d 612, 620 (Ariz. Ct. App. 1988), the Arizona Court of Appeals upheld the trial court's finding that punitive damages were excessive where "there was no basis in the evidence for concluding that [the defendant's] net worth even approached the jury's $500,000 punitive damage award." The court stated that a punitive damages award "must not financially kill the defendant." *Id.* at 621. The court emphatically rejected the plaintiff's argument that "any disproportion between the defendant's wealth and the punitive damage award should be disregarded, because the defendants have insurance." *Id.* The court explained:

> It is a defendant's own wealth, not his insurer's wealth, that bears on the proper level of punitive damages. Punitive damages are premised on the jury's expectation, sometimes a fiction, that the defendant himself will bear their punitive sting. We will not observe that premise to support the concept of punitive damages but abandon it to preserve a disproportionate award on the theory that "the defendant won't have to pay it anyway." *Id.*

Many other courts have reached the same conclusion. *See*,

e.g., *Michael v. Cole*, 595 P.2d 995, 997 (Ariz. 1979) (holding that insurance is *not* "an asset of the defendant" relevant to punitive damages even where the defendant has testified as to his poverty; rejecting plaintiff's argument that "unless he [was] allowed to comment on the defendant's insurance coverage, the defendant will be able to mislead the jury with evidence of his impecuniosity"); *Baker v. Armstrong*, 744 P.2d 170, 173 (N.M. 1987) ("punitive damages liability coverage is not an asset which can be used to measure true punishment" and "therefore, it should not be considered . . . in assessing a defendant's financial standing"); *City of West Allis v. Wisconsin Elec. Power Co.*, 635 N.W.2d 873, 889 (Wis. Ct. App. 2001) (citing *Baker*, holding that evidence of insurance was "not evidence of wealth" for purposes of reviewing a punitive award). Moreover, in *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 41, 44 (Tex. 1998) upon which Plaintiff incorrectly relies (Opp. at 18), the Texas Supreme Court cited *Baker* and held that the trial court had properly excluded evidence of insurance coverage.[2] *See also Odoms v. Travelers Ins. Co.*, 339 So. 2d 196, 199 (Fla. 1976) (trial judge erred in ruling that "insurance policy's liability limits should be considered as an 'asset' of the defendant and . . . considered in assessing punitive damages").[3]

Similarly, courts have rejected the argument that a punitive damages award that is vastly disproportionate to the defendant's net worth may be upheld because the defendant would have other sources of indemnification, such as indemnification by his employer or a bad faith action against his insur-

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[2] In *Malone*, the Texas Supreme Court also approved the trial court's consideration of additional evidence on the issue of punitive damages at a post-trial hearing, including evidence of the defendant's financial condition. 972 S.W.2d at 44, 52.

[3] *Accord, e.g., Osborne v. Wenger*, 572 N.E.2d 1343, 1345 (Ind. Ct. App. 1991) (rejecting plaintiff's argument that "the trial court erred in allowing the defendant to testify regarding his minimal net worth, without allowing her to cross-examine him on the availability of insurance"); *Curry v. Giant Food Co.*, 522 A.2d 1283, 1290 & n.11 (D.C. 1987) (agreeing with Arizona Supreme Court's holding in *Michael v. Cole*, that "an insurance policy is not an asset of the defendant which the plaintiff can introduce into evidence on the issue of punitive damages" to rebut defendant's testimony "that they possessed little or no net worth").

ance company. *See, e.g., Rosenbloom v. Flygare*, 501 N.W.2d 597, 602 (Minn. 1993) (defendant's ability to pay, although not presented to the jury, was "a factor worthy of consideration in the exercise of our supervision over [punitive awards] even if the defendant is ultimately to be indemnified by another"). As a Florida appellate court opined, permitting consideration of a potential bad faith claim as evidence of net worth would result in "unlimited" punitive damage awards and "make the insurer 'responsible to pay damages in an amount that would never have been considered by the parties were the insurance company not the responsible entity.'" *Wransky v. Dalfo*, 801 So. 2d 239, 242 (Fla. Dist. Ct. App. 2001) (quoting *Battista v. W. World Ins. Co.*, 545 A.2d 841, 849 (N.J. Super. Ct. Law Div. 1988), *rev'd in part on other grounds*, 594 A.2d 260 (N.J. Super. Ct. App. Div. 1991)); *see also Carr v. City of Florence*, 729 F. Supp. 783, 787 (N.D. Ala. 1990) (emphasizing the "important difference between evidence as to a defendant's actual, personal wealth for use in arriving at an appropriate amount of exemplary damages, i.e., the sum necessary to punish him by an invasion of his pocketbook, and evidence of insurance coverage or third-party indemnity," which serves only to get into the "deep pockets of the indemnitor or insurance company").

Plaintiff relies on unpersuasive dicta from *Kemezy v. Peters*, 79 F.3d 33, 37 (7th Cir. 1996), for the proposition that if a defendant has insurance or indemnification, he should not be allowed to "plead poverty." *Kemezy* reasons that insurance itself "reduces the financial incentive to avoid wrongdoing" and that it "would be worse if the cost of the insurance fell, reducing the financial disincentive to engage in wrongful behavior" because insureds could plead poverty. *Id.* This rationale ignores the destructive financial impact a punitive award can have on a defendant even if the award is covered by insurance. *See* Point I.B.ii *infra*. This rationale also ignores the societal, individual and business harms that result when insurance rates for an industry providing necessary services skyrocket because of enormous punitive damages awards. *See, e.g.*, Br. of *Amici Curiae* Am. Health Care Ass'n, *et al.*, at 7, 14-19 (insurance rates for nursing homes have soared because of staggering punitive damages awards); Br. of *Amicus Curiae* Arkansas Ins. Dep't, at 3-13 (describing insurance price and availability problems for Arkansas nursing homes).

Moreover, businesses do not purchase insurance in order to circumvent the deterrent effects of punitive damages and engage in bad conduct without consequences. Rather, "the most careful [defendant] may wish to insure against the adverse finding of those charged with weighing the evidence to determine (by a preponderance) whether an act or omission constituted ordinary or gross negligence" meriting punitive damages. *Baker*, 744 P.2d at 173. As the New Mexico Supreme Court has pointed out, deterrence is not thwarted because punitive damages are insured – "the prospect of cancelled coverage or rated premiums is a strong deterrent . . . . for those who seek to maintain coverage against the eventuality of a punitive damage award." *Id.*[4]

In short, Plaintiff's contention that the punitive damages award will be paid by an insurance company has no bearing on the constitutional questions raised by the vast disproportion between the punitive award and defendants' net worths.

ii. Even If Insurance Coverage Were Relevant, a Post-Trial Evidentiary Hearing Is Constitutionally Required

In arguing that insurance coverage renders moot the constitutional issues raised by the disproportion between the punitive award and defendants' assets, Plaintiff relies upon partial and misleading quotations from Advocat's most recent 10-Q form. As Plaintiff notes, the 10-Q states that "the Company believes the [$26,425,000 compensatory and punitive damages in this case] will be within the Company's insurance coverage." Advocat Form 10-Q, 6/30/2003, at 12. Plaintiff omits the fact, however, that the 10-Q goes on to state that "to the extent the Company's professional liability insurance pays large amounts with respect to this verdict, there may not be sufficient insurance coverage for other claims during the same time period" and that the "ultimate results of all of the Company's professional liability claims and disputes are un-

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[4] Consideration of insurance is improper for the additional practical reason that it is often not clear whether an award of punitive damages will be covered until well after the punitive damages award has been rendered and appealed. Insurance coverage for punitive damages may depend upon whether a defendant's conduct was merely grossly negligent or whether it was intentional. *See, e.g., S. Farm Bureau Cas. Ins. Co. v. Daniel*, 440 S.W.2d 582, 584 (Ark. 1969).

known at the present time." *Id.* at 13. The 10-Q warns that "there can be no assurance that verdicts against the Company will not exceed the policy limits of the Company's insurance policies." *Id.* Thus, as the 10-Q makes clear, the $21 million punitive damages award, if permitted to stand, will consume a large portion of Advocat's insurance – which covers not just Rich Mountain, the nursing home at issue here, but all the numerous nursing homes owned by Advocat and its subsidiaries.[5] Given defendants' precarious financial conditions, the ultimate result could be that other claims for compensatory damages may go unsatisfied, that defendants may not be able to afford or obtain insurance in the future, and that defendants may face financial ruin. *See* Br. of *Amici Curiae* Am. Health Care Ass'n, *et al.*, at 14-19 (describing threat to nursing home industry from huge punitive awards and spiraling insurance rates); Br. *Amicus Curiae* of Ark. Ins. Dep't, at 3-13 (same).

Accordingly, insurance coverage does not alter defendants' due process entitlement to a meaningful determination, after a post-trial evidentiary hearing, as to the excessiveness of the punitive award in relation to defendants' financial conditions. This Court should grant review to clarify that consideration of a defendant's financial condition is an essential element of a constitutionally sound review of a punitive award.

II. The Arkansas Courts' Failure to Apply the *Gore* Guideposts Separately to Each Defendant Contravened Procedural and Substantive Due Process

Plaintiff does not dispute that the Arkansas Supreme Court

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[5] The 10-Q also states "participants in the health care industry have become subject to an increasing number of lawsuits alleging malpractice, product liability, or related legal theories, many of which involve large claims and significant defense costs. The entire long-term care profession in the United States has experienced a dramatic increase in claims related to alleged negligence in providing care to its patients – the Company is no exception in this regard." *Id.* at 37. Thus, "the insurance coverage limits available to the Company has declined significantly beginning in 1999. . . . [D]ue to the increasing cost of claims against the Company and throughout the long-term care profession in general, the Company's professional liability insurance premiums and deductible amounts increased substantially and insurance coverage limits decreased substantially during 1999 through 2002 and continuing for policy year 2003." *Id.* at 23. Advocat's Form 10-Q is available at www.sec.gov.

and trial court failed to consider each defendant's conduct separately in reviewing the constitutional propriety of the punitive damages award. Contrary to Plaintiff's contentions, an individualized evaluation of reprehensibility, ratio and comparable penalties with respect to each of the three defendants was required as a matter of due process. *See Gore*, 517 U.S. at 575 ("exemplary damages imposed on a defendant should reflect the 'enormity of his offense'") (citation omitted); *see also* Pet. at 20. Indeed, the Arkansas courts' group treatment of the defendants is directly in conflict with a new decision by the Ninth Circuit, which instructed the trial court that it must "evaluate the degree of reprehensibility of each of the defendant's misconduct individually, as opposed to *en grosse*." *See Bell v. Clackamas County*, 341 F.3d 858, 867 (9th Cir. 2003) (remanding discrimination case for individual evaluation of reprehensibility of conduct of each member of sheriff's office); *see also In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) (considering relative reprehensibility of company defendant as compared to individual defendant).

Plaintiff argues that individual analysis of the *Gore* factors as to each defendant was unnecessary because the three defendants operated as "one business." Opp. at 23. In opposing defendants' motion for remittitur, however, Plaintiff expressly stated to the trial court that Plaintiff "never argued an alter ego theory with respect to any Defendant" but had tried "a case of direct liability against each corporation and the jury was instructed as such." Pet. App. 83a. Plaintiff also denied that it had "asked the jury to pierce the corporate veil and hold Advocat liable for the actions of its subsidiaries." Pet. App. 83a-84a. Under Plaintiff's own theory of the case, it was incumbent upon the Arkansas courts to address each defendant's conduct separately in applying the *Gore* analysis.

Moreover, even assuming that the defendants were operating one business, as Plaintiff contends, individualized application of the *Gore* factors was constitutionally mandated. Any three individuals or corporations might come together to operate a business, but their roles in that business, and the actual conduct of each, might be very different. Such was indisputably the case here (Pet. at 2, 24), and Plaintiff makes no contention to the contrary. Where the conduct is different, the relevant considerations about punishment are different.

The Arkansas courts committed constitutional error in failing to apply the *Gore* analysis to the conduct of each corporation.

The Arkansas courts' error was not confined to the reprehensibility guidepost. The ratio and civil penalties guideposts must also, as a constitutional matter, be calibrated to the conduct of each defendant. When this Court in *Campbell* set forth the principles governing application of the ratio guidepost, it emphasized the need to consider "the facts and circumstances of the defendant's conduct." 123 S. Ct. at 1524. Because the Arkansas Supreme Court ignored the facts and circumstances of each defendant's conduct, its ratio analysis failed to "ensure that the measure of punishment is both reasonable and proportionate." *Id.* Furthermore, Plaintiff's contention that the punitive damages award in this case is sustainable by reference to purportedly applicable criminal penalties (Opp. at 24) is erroneous. Plaintiff not only disregards this Court's admonition as to the limited utility of criminal penalties in the due process punitive damages analysis, *Campbell*, 123 S. Ct. at 1526, but also (like the Arkansas Supreme Court) refuses to acknowledge that differing civil penalties would be relevant to the defendants' differing conduct.

Plaintiff also incorrectly argues that the $21 million punitive award is sustainable because the harm in this case was physical. Plaintiff, like the Arkansas Supreme Court, ignores the principle laid down by this Court in *Campbell*, that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 1524. This Court did not condition the applicability of that principle on the character of the harm. *See id.* Plaintiff also disregards the punitive and deterrent effect of the remitted compensatory award, a still very high $5 million. *See* Pet. at 23-24.[6] Certiorari is warranted to review and correct the Arkansas Supreme Court's misapplication of the *Gore* guideposts.

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[6] Plaintiff also does not address, much less attempt to defend, the trial court's extreme and improper deference to the jury and its failure to treat the constitutional excessiveness inquiry as a question of law for the court. *See* Pet. at 20-22.

III. The Arkansas Supreme Court's Imposition of Joint and Several Liability for Punitive Damages Contravened the Due Process Principles Set Forth in this Court's Punitive Damages Jurisprudence

Plaintiff attempts to deflect the constitutional concerns posed by the Arkansas Supreme Court's *sua sponte* imposition of joint and several liability for punitive damages by an irrelevant and incorrect discussion of jury instructions. Plaintiff erroneously contends that "[a]t trial the Advocat defendants were content to allow the case to go to the jury with instructions that treated all of the Advocat Defendants as one." Opp. at 19. In fact, it was never disputed in this case that the standard Arkansas instruction should be given, telling the jury that each defendant was "entitled to a fair consideration of his own defense" and that "each defendant's case" should be decided " as if it were "a separate lawsuit." Pet. App. 155a. That instruction reflected the theory of direct liability against each defendant upon which Plaintiff tried this case – a theory that is irreconcilable with the Arkansas Supreme Court's imposition of joint and several liability for punitive damages.

Contrary to Plaintiff's contentions (Opp. at 19-21), the issue of joint and several liability has nothing to do with jury instructions or sufficiency of the evidence and is not a factual issue as to whether the three defendants "operated one business." The trial court recognized that defendants were separate corporate entities (Pet. at 6 n.3), and Plaintiff acknowledged after trial that it did not sue on an alter ego theory but instead sought to hold each corporation liable for its own individual conduct. Pet. App. 83a-84a. The Arkansas Supreme Court's decision to render each defendant jointly and severally liable for the entire amount of punitive damages in this case violated the due process rights of each defendant, because it resulted in an award that had no reference to each defendant's conduct and culpability. *See* Pet. at 26-29. Certiorari should be granted to clarify that a joint and several punitive damages award that erases the significant differences between defendants is constitutionally impermissible under this Court's punitive damages jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 03-160

IN THE

Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

v.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* ARKANSAS INSURANCE DEPARTMENT, ARKANSAS INSURANCE COMMISSIONER MIKE PICKENS, IN SUPPORT OF PETITIONERS

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ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, AND DIVERSICARE MANAGEMENT SERVICES CO.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* ARKANSAS INSURANCE DEPARTMENT, ARKANSAS INSURANCE COMMISSIONER MIKE PICKENS

The Arkansas Insurance Department (Department), Arkansas Insurance Commissioner Mike Pickens, respectfully requests permission to file the attached brief *amicus curiae*, pursuant to Rule 37.2(b). Petitioners have consented to the filing of this Brief.[1] Respondent has withheld consent.

[1] Petitioners' letter expressing consent has been filed with the Clerk of the Court.

The Department regulates the insurance industry in the State of Arkansas. The Department's primary mission is "consumer protection through insurer solvency and market conduct regulation, and fraud prosecution and deterrence." Ark. Code Ann. § 23-61-101(c)(1)(B). The Department's interest in this litigation arises out of its duty to protect Arkansas consumers.

Because of huge verdicts like the one at issue in this case, nursing homes have an almost impossible time finding liability insurance. The lack of long-term care liability insurance has a profound effect on the insurance industry and citizens of the State of Arkansas. .

Arkansas Insurance Commissioner Mike Pickens[2] has met with both nursing home resident advocates and nursing home owners/operators to try to find a solution to this common problem. Commissioner Pickens has written, and been written about in, numerous articles on the subject. Elizabeth Caldwell, *Lawyers Criticize Insurance Commissioner's Call for Reform*, DONREY NEWS, LITTLE ROCK BUREAU, Oct. 4, 2001, *available at http://*www.nwaonline.net; Gwen Moritz, Editor's Note, *Man Bites Dog*, ARK. BUS., Oct. 8, 2001, at 7; David Smith, *Insurance Chief Blasted for Idea on Tort Reform*, ARK. DEMOCRAT-GAZETTE, Oct. 9, 2001, at 1D, 2D; Doug Smith, *Insurance Commissioner Touts Tort Reform*, ARK. TIMES, Oct. 12, 2001; Gwen Moritz, *Higher Rates Stanch Nursing Homes' Red Ink*, ARK. BUS., Feb. 4-10, 2002; Press Release, Arkansas Insurance Department, Advocates for Nursing Home Residents, Nursing Home Owners and the Insurance Department Meet to Find Common Ground (March 18, 2002) (on file with the Department); Curt Hodges, *Insurance Commissioner Discusses Unlicensed Sales, Tort Reform*, JONESBORO SUN, Nov. 21, 2002; Mike Pickens, Special to the Democrat-Gazette, *Tort Reform Allows Better Access to Courts, Civil Justice for Aggrieved*, ARK. DEMOCRAT-GAZETTE, Jan. 12, 2003 (on file with the Department); Mike Pickens, *Calling It Like It Is: Civil Jus-*

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[2] Commissioner Pickens is currently serving as President of the National Association of Insurance Commissioners.

tice Reform, 4 THE AID NEWSLETTER 1, Winter/Spring 2003 (on file with the Department).

He has also written numerous letters to the media and lawmakers about the need for consistency and predictability with regard to jury awards. Letter from Mike Pickens to The Honorable Jon Fitch, Chairman, The Honorable Steve Napper, Chairman, Senate and House Insurance and Commerce Committee Members (March 29, 2001) (on file with the Department); Letter from Mike Pickens to Mr. Paul E. Harrison, President, Arkansas Trial Lawyers Association (November 21, 2001) (on file with the Department); Letter from Mike Pickens to Mr. Paul Greenberg, Editorial Page Editor (October 11 2001) (on file with the Department); Letter from Mike Pickens to The Honorable Samuel E. Ledbetter, State Representative (October 8, 2001) (on file with the Department); Letter from Mike Pickens to Ms. Nancy Johnson, Vice President, Arkansas Advocates for Nursing Home Residents (February 7, 2002) (on file with the Department); Letter from Mike Pickens to The Honorable Bob Adams, State Representative (December 20, 2002) (on file with the Department); Letter from Mike Pickens to The Honorable Paul Bookout, Chairman, The Honorable Lindbergh Thomas, Vice Chairman, House Insurance and Commerce Committee Members (February 12, 2003) (on file with the Department); Letter from Mike Pickens to The Honorable Ed Wilkins, Chairman, The Honorable Jim Luke, Vice Chairman, Senate Judiciary Committee Members (February 19, 2003) (on file with the Department); Letter from Pickens to the Editor, c/o Doug Smith, *Arkansas Times* (May 20, 2003) (on file with the Department).

The Commissioner is in the unique position of hearing firsthand the cause and effect of this problem. The Department held a hearing in September 2001 to determine if long-term care liability insurance coverage was reasonably available in the state. Both nursing home owners/operators and insurance industry representatives testified to what they call a "crisis." As discussed in detail in the attached brief, the evidence showed that large jury verdicts are a major reason there is virtually no liability insurance market for Arkansas nursing homes. The obvious due process/fair trial issues

raised by this case have sent shock waves through the Arkansas insurance market and will undoubtedly only exacerbate Arkansas' already highly stressed nursing home liability and medical malpractice markets.

The Department and Commissioner Pickens respectfully request leave of the Court to file the attached brief *amicus curiae*.

Respectfully submitted,

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In the Matter of the Reasonable
Availability of Long-Term Care
Liability Insurance in the State of Arkansas,
AID Order No. 2001-229
(Ark. Ins. Dep't Oct. 1, 2001) ..... *passim*

Pursuant to Supreme Court Rule 37, the Arkansas Insurance Department (Department), Arkansas Insurance Commissioner Mike Pickens, submits this Brief in support of Petitioners Advocat, Inc., Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Diversicare Management Services Company and respectfully requests that the Court issue a writ of certiorari to review a judgment of the Arkansas Supreme Court entered in the action.[1]

INTEREST OF THE *AMICUS CURIAE*

The Department regulates the insurance industry in the State of Arkansas. The Department's primary mission is "consumer protection through insurer solvency and market conduct regulation, and fraud prosecution and deterrence." Ark. Code Ann. § 23-61-101(c)(1)(B). The Department's interest in this litigation arises out of its duty to protect Arkansas consumers.

On September 19, 2001, Arkansas Insurance Commissioner Mike Pickens held a fact-finding public hearing to determine whether long-term care liability insurance coverage[2] was reasonably available in the state. Based on the evidence presented, he concluded that nursing home liability coverage was not reasonably available in Arkansas.

Arkansas insurance consumers suffer if a nursing home does not have liability insurance coverage. Often, nursing home financing agreements require liability coverage. If a home either cannot afford or cannot find such coverage, the home is in breach of its financing agreement and risks foreclosure. If a nursing home is forced to close, residents will

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* Arkansas Insurance Department authored this Brief in its entirety, and no person or entity made a monetary contribution toward the preparation or submission of this Brief.

[2] In this Brief, the terms "long term care liability insurance coverage" and "nursing home liability coverage" are used interchangeably.

have to relocate. The remaining homes face overcrowding, and residents may have no place for their loved ones who need round-the-clock professional care.

Evidence presented at the hearing showed that large verdicts, specifically the verdict at issue in this case, are the major reason Arkansas nursing homes have an almost impossible task when seeking liability coverage. Due to large jury verdicts, Arkansas nursing homes pose an uncertain risk. Insurers have trouble quantifying the risk, since there is virtually no limit to a potential judgment. When insurers attempt to price for the actual risk assumed, the premiums are frequently too costly for most homes to afford. Funds that should go to patient care must go to pay the high cost of insurance. Furthermore, in an attempt to reduce the potential risk, insurers use strict underwriting guidelines that severely limit the coverage provided. Some homes do not meet the underwriting guidelines, and insurers are unwilling to offer coverage. Many Arkansas nursing homes face the prospect of going without liability insurance coverage.

The lack of this coverage will directly affect Arkansas consumers. The extra costs of insurance, or of doing business without insurance, will ultimately be passed on to Arkansas nursing home residents and their families. To prevent the potentially devastating effects of the lack of long-term care liability insurance coverage, the Department and Commissioner Pickens respectfully request that this Court issue a writ of certiorari in this matter.

SUMMARY OF ARGUMENT

This verdict in this case affects not only the parties to the case, but the entire State of Arkansas. Nursing home owners face the prospect of running their homes without liability insurance, which places the homes at risk of foreclosure. Nursing home residents would then be forced to relocate. The remaining homes would face overcrowding, and some residents may ultimately have no place to go.

Astronomical verdicts like the one at issue show insurers that the sky is the limit in Arkansas. Insurers have an extremely difficult time pricing the risk posed by an Arkansas nursing home. When an insurer tries to price the risk, the cost is so high that most nursing homes cannot afford the coverage. Money earmarked for patient care must instead be used to pay astronomical insurance premiums.

This Brief will describe the long-term care liability insurance situation in Arkansas on September 19, 2001, as well as the reasons for the situation. The petition for certiorari should be granted.

ARGUMENT

On April 18, 2001, Arkansas Governor Mike Huckabee signed Act 1825 of 2001. 2001 Ark. Acts 1825. The Act authorized Arkansas Insurance Commissioner Mike Pickens[3] to create a long-term care liability pool if he found that long-term care liability insurance coverage was not reasonably available in the State of Arkansas. *Id.*

On September 19, 2001, Arkansas Insurance Commissioner Mike Pickens held a public hearing to determine if long-term care liability insurance was reasonably available in Arkansas. The attendees included representatives from the nursing home industry, the media, a representative from the governor's office, and a state representative.[4] After hearing the testimony and reviewing the documentary evidence, Commissioner Pickens concluded that long-term care liabil-

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[3] Commissioner Pickens is currently serving a year-long term as president of the National Association of Insurance Commissioners.

[4] Although all interested parties were invited, no representatives from the plaintiff's bar or consumer groups representing nursing home residents attended. Transcript at 59. For purposes of this Brief, "Transcript" refers to the transcript of the Department's hearing on September 19, 2001, "In the Matter of: Nursing Home Liability Insurance Availability." Exhibits to the transcript will be cited as "Ex. X" followed by a complete description of the exhibit.

ity insurance was not reasonably available in Arkansas. In the Matter of the Reasonable Availability of Long-Term Care Liability Insurance in the State of Arkansas, AID Order No. 2001-229 (Ark. Ins. Dep't Oct. 1, 2001).

The evidence presented at the hearing gave a dim view of the long-term care liability insurance situation in Arkansas. Such evidence included the results of a survey conducted by the Department. The Department polled the long-term care liability insurance carriers that wrote this coverage in the state to see how much of this coverage they were still writing in Arkansas.[5] Transcript at 6. William R. Lacy, Director of the Department's Property and Casualty Division, testified to the survey's results. He said that nursing home liability coverage from a carrier admitted to do business in Arkansas is difficult to find. Transcript at 8. Out of 80 carriers authorized to write this coverage, only one carrier is active in the market. *Id.* This carrier had three (3) policies and was not accepting new business. *Id.* The carrier is using stringent underwriting guidelines, so the three (3) policies in force may or may not be renewed. *Id.* Two (2) other carriers filed nursing home liability insurance products but never issued a policy. *Id.* Practically, no coverage is available in the admitted market. Transcript at 16. Director Lacy testified that surplus lines[6] insurance carriers provide most of the nursing home liability coverage in Arkansas. Transcript at 8.

Witnesses testified that the situation is dire. Representa-

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[5] The survey was sent to many insurers, but the results entered into the records where those from carriers who had written nursing home liability coverage here or who had received Departmental approval for such products. Transcript at 7-8.

[6] Surplus lines carriers are not directly regulated by the Department. Transcript at 14. Licensed carriers apply to do business in a state and file rates. Transcript at 14-15. The Department regulates their solvency, and the Guaranty Fund steps in to pay claims if an admitted carrier becomes insolvent. *Id.* Surplus lines carriers take a risk if no admitted carrier is willing to take that risk. Transcript at 15. The Guaranty Fund does not pay the claims if a surplus lines carrier becomes insolvent. *Id.* Lloyd's of London is an example of a surplus lines carrier. Transcript at 15-16.

tives of Beverly Enterprises (Beverly) said a crisis exists. Transcript at 43. Beverly is the largest nursing home corporation in Arkansas and the United States. Transcript at 58. Beverly had an over 300% increase in its litigation volume since 1998 for its Arkansas homes. Transcript at 39. Beverly was at the end of a multi-year insurance plan and had exhausted both the Arkansas and the surplus lines markets trying to find new coverage. Transcript at 45, 46. Beverly was planning to go overseas to try to find coverage. Transcript at 45. When a company with Beverly's size and buying power has such trouble finding insurance coverage, the situation is even blacker for the smaller homes.

The Beverly representatives pointed out that many homes have bank financing agreements that require the homes to carry liability coverage. Transcript at 40; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3. A home without insurance faces the possibility of having its loan called, which would result in the home's demise. Transcript at 40; Ex. 9, Letter from Goss, to Pickens of 9/19/01, at 3. The nursing home employees would lose their jobs. Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3. The home's residents would have to find somewhere else to go. Ex. 9, Letter from Goss to Pickens of 9/19/02, at 3. The remaining nursing homes would face overcrowded conditions. Some residents could be turned away and have nowhere to go.

Although nursing homes receive reimbursement from Medicaid, nursing homes cannot rely on Medicaid reimbursement to assist in the payment of higher insurance rates. The reimbursement process is so slow that a nursing home would have to pay for a second year premium before it is reimbursed for the previous year's premium. Transcript at 42; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 4.

Furthermore, nursing home closures could have an effect on state Medicaid funding. Transcript at 41; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3-4. The Arkansas State Medicaid plan must give the federal government assurances regarding reasonable and adequate access to covered ser-

vices. Transcript at 41; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3-4. Nursing home closures could cast doubt on these assurance and risk millions of dollars of federal Medicaid funds. Transcript at 41; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3-4. Since Medicaid covers only a portion of the expenses of Medicaid residents, private pay patients will have to pay substantially more to cover the increased costs of liability insurance. Ex. 9, Letter from Goss to Pickens of 9/19/01, at 4.

All Arkansas nursing homes end up paying the cost of huge judgments, not just the homes against whom the judgments are rendered. Bud Bulloch is an Arkansas insurance agent specializing in insurance coverage for nursing homes, and he is also a nursing home owner. Transcript at 60, 61; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. He testified that there was no nursing home liability insurance market in Arkansas seeking new business. Transcript at 61-62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. One or two carriers might provide coverage for a limited number of non-profit homes, but most homes he insured had to obtain coverage from the surplus lines market. Transcript at 62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. Surplus lines coverage meant inferior coverage. Transcript at 62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. The surplus lines carriers refused to insure punitive damages. Transcript at 76-77. These carriers would not cover physical and sexual abuses in the homes, and these coverages are very important to nursing homes owners. *Id.* Surplus lines coverage also meant high deductibles, and high prices. Transcript at 62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1.

As an example of the current situation, Mr. Bulloch described an excellent non-profit home he was trying to insure that could not obtain affordable coverage. Transcript at 62-63; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. This home had never had a patient care claim, had good management and nursing, excellent state survey results, and good financials. Transcript at 62-63; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. The only coverage this home could

purchase was at a 300% price increase from what it paid the year before; the new coverage had a high deductible and, unlike last year, no umbrella coverage. Transcript at 63. The coverage purchased the previous year was also at a 300% increase from the year before that, *Id.*, for a total 600% price increase in the last two (2) years. In Mr. Bulloch's opinion, the $130,000 cost for the home's coverage would be more than most homes would make in a year. Transcript at 73-74. Even though the home in this example had never had a claim, it nonetheless was having the same trouble as all the other homes had when trying to find coverage. All homes are equally affected by this crisis, regardless of the homes' quality of care and claims history.

Mr. Bulloch noted that there was a raise in the reimbursement system. Transcript at 70. Nursing home owners that originally planned to use this money for patient care had to spend it on insurance. *Id.* Nursing home residents suffer when money goes to insurance instead of their care.

Mr. Bulloch stated that the insurance industry considers Arkansas "the worst of the worst" when it comes to Arkansas' ability to provide nursing home liability coverage. Transcript at 64; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 2. Carriers would not write business here. Transcript at 65; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 2. Mr. Bulloch mentioned a major surplus lines carrier that cancelled all its nursing home liability coverage mid-term and forced those homes to try to find coverage elsewhere. Transcript at 79. According to Mr. Bulloch, ". . . what's out there today probably won't be there six months from now." Transcript at 77-78.

Bud Bulloch has all of his assets in his nursing homes, and his personal guaranty is on the bank notes. Transcript at 74. If one of his nursing homes is sued for millions of dollars, he faces personal financial ruin. *Id.*

According to Mr. Bulloch, the situation was getting worse. The underwriting was getting tougher. Transcript at 64; Ex.

3, Letter from Bulloch to Farris of 9/11/01, at 2. The surplus lines carriers were running out of capacity. Transcript at 64; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 2. Mr. Bulloch, like all the other nursing home owners who testified, was desperate to find coverage for his nursing homes.

Leon Catlett is an Arkansas nursing home operator with six (6) facilities. Transcript at 81. He sent his homes' application for coverage to 36 carriers and received only one quote. *Id.* Coverage for the previous year cost $89,000; coverage for the next year would be $1,030,000. *Id.* He cannot afford those prices. Transcript at 82. He exhausted the American and overseas markets, Transcript at 83, and was applying with Lloyd's of London. Transcript at 82. As of the hearing date, his homes did not have insurance coverage. Transcript at 83. Mr. Catlett knew about 22 homes in Arkansas that would not have liability coverage. Transcript at 82.

Brownwood Manor, a nursing home in Fort Smith, sent a letter introduced as an exhibit at the hearing. Transcript at 82-83; Ex. 10, Letter from Hickey to Morton of 9/17/01. The lowest quote Brownwood Manor received for liability insurance was $247,000.00, or $2,266 per bed. Transcript at 83; Ex. 10, Letter from Hickey to Morton of 9/17/01. At the time of the hearing, Brownwood Manor was without insurance for the first time in its twenty-seven (27) years of operation. Transcript at 83; Ex. 10, Letter from Hickey to Morton of 9/17/01.

Alan Curtis works for Crestpark Nursing Homes, which has eight homes. Transcript at 86; Ex. 4, Letter from Curtis to Farris of 9/14/01. The homes' liability coverage went from $45,000 in 2000 to $520,000 in 2001, in spite of the fact that the homes had no claims filed. Transcript at 86; Ex. 4, Letter from Curtis to Farris of 9/14/01. Mr. Curtis's current carrier told him that if the carrier decides to write in 2002, his premium would double. Transcript at 86; Ex. 4, Letter from Curtis to Farris of 9/14/01. His nursing home will probably not have any coverage after December. Transcript at 86.

Marty Rhodes is president of Rhodes & Associates, a Little Rock insurance agency specializing in nursing home insurance. Transcript at 87. In his twenty-eight (28) years as an insurance agent, Marty Rhodes had never seen a crisis like the one at issue. Ex. 5, Martin M. Rhodes, Statement Before Arkansas HR Judiciary Committee, Feb. 22, 2001, at 1. Before mid-2000, nursing home liability coverage averaged $50 per bed, with a $1 million dollar limit per incident. *Id.* In 2001, if a home could get insurance, the coverage costs a minimum of $400 per bed and sometimes up to $1,500 per bed. *Id.* Some facilities dropped their excess coverage. *Id* at 2. The coverage available in 2001 was more restrictive, with punitive damages and abuse excluded from coverage. *Id.*

Rhodes pointed out that many nursing homes have financing agreements that require the homes to have liability coverage. *Id.* Without such insurance, these nursing homes would be in default of their financing agreements. *Id.* Rhodes knew nine (9) homes without insurance. *Id.* As such, the employees were not covered, which affects the home's ability to hire staff. *Id.* No one wants to work for a home that does not have insurance to cover him. For the previous five (5) years, Rhodes & Associates had exclusive contracts with admitted carriers that have since withdrawn from the market. Transcript at 88. According to Marty Rhodes, "the market place has just dried up." Transcript at 90.

Brandon Adams is president of a nursing home company that has eight (8) nursing homes. Transcript at 91. According to Mr. Adams, ". . . the train wreck is just beginning and it gets worse every day. . . ." *Id.* Mr. Adams has also personally guaranteed his bank notes. *Id.* He could not get coverage for his nursing homes. Transcript at 101. Insurance agents were telling him that no carrier had affordable coverage. Transcript at 101-02. Mr. Adams pointed out that the situation creates a problem within the state. Transcript at 98. He asked, "[w]hat are we going to do with the 27,000 people that are in our nursing homes?" Transcript at 95.

Arkansas State Representative Roger Smith testified that he had heard from the families of nursing home residents and from people who may be future nursing home residents. Transcript at 102-03. Although people complained about nursing home care, he most often heard from people concerned about losing their local nursing homes. Transcript at 104-05. If these nursing homes closed, these people did not know where they would take their loved ones. Transcript at 105.

Representative Smith said we were quickly approaching a crisis. *Id.* The nursing home owners who testified at the hearing had invested in what used to be a good business, and they had intended to provide quality care for the elderly in their community. *id.* According to Representative Smith, ". . . today they're struggling just to keep their doors open." *Id.*

Representative Smith discussed a state law that created a quality assurance fee to be borne by the nursing homes. Transcript at 106. With the Medicaid matching funds, the fee was going to inject $120 million to $130 million dollars into nursing homes for patient care. *Id.* Sixty percent of the money was to be used for direct care, and 40% was to be used for indirect care. *Id.* Instead, more money was being used for indirect costs, such as high liability insurance, and less was being used for direct patient care. *Id.*

Representative Smith noted that the cost of nursing home care has risen dramatically. Transcript at 108. He visited a constituent whose husband had been a nursing home patient for over five (5) years. Transcript at 108-09. Her husband was a private pay patient, and it cost $50,000 annually to keep him in the nursing home. Transcript at 109. The constituent had been advised by her attorney that she would have to divorce her husband at some point, so she will have some assets left to pay for her own care when the time came. *Id.*

On October 1, 2001, Commissioner Pickens signed Order No. 2001-229. In the Matter of the Reasonable Availability

of Long-Term Care Liability Insurance in the State of Arkansas, AID Order No. 2001-229 (Ark. Ins. Dep't Oct. 1, 2001). In this Order, he found that long-term care liability insurance coverage was not reasonably available in the State of Arkansas. *Id.* The Order noted that, since April 2001, judgments against Arkansas nursing homes totaled at least $93 million. *Id.* The Order listed the following as reasons for the situation:

a. Increasing loss severity
b. Difficulty predicting future loss trends
c. Difficulty in pricing, due to escalating court judgments and settlements
d. Better risk management is needed
e. Financial condition of long-term industry is perceived to be poor
f. Low/slow Medicare reimbursement rates
g. Lack of reinsurance

Id.

Most carriers refuse to write nursing home liability insurance in Arkansas due to a lack of meaningful civil justice reform. *Id.* Director Lacy testified that judgments against nursing homes are increasing in amount. Transcript at 9-10. A Beverly representative noted that, in the past 120 days, $100 million dollars in judgments were entered against Arkansas nursing homes. Transcript at 38. All nursing homes, and ultimately all nursing home residents, will ultimately end up paying for these judgments.

Director Lacy explained that actuaries try to predict future losses based on what has happened in the past. Transcript at 21. Because of the escalating judgments, insurers cannot look to a home's past loss history to predict future losses. Transcript at 10. Insurers, therefore, have a hard time pricing coverage; if they do price in accordance with the risk assumed, the price is very high. *Id.* Director Lacy testified that insurers need effective reform that will limit how high a judgment can go. Transcript at 10. Insurers could then better predict a

nursing home's future losses and properly price coverage. *Id.* Bud Bulloch agrees that no insurer would take on the risk Arkansas nursing homes present. Transcript at 67.

All homes, not just the homes with high claims histories, pay for these high judgments. Arkansas has a small market, so high verdicts have a greater impact. Transcript at 9. Director Lacy pointed out that the verdict in this case, if spread over the 22,000 beds in Arkansas nursing homes, results in $3,000 per bed. *Id.* Even homes with no claims history are affected by these judgments. All homes pay for these judgments, not just the homes against whom the verdicts are rendered.

Marty Rhodes agrees that the current legal climate is the main reason for the unavailability of this coverage. Ex. 5, Martin M. Rhodes, Statement Before Arkansas HR Judiciary Committee, Feb. 22, 2001, at 3. The large judgments and increased number of lawsuits have directly affected the affordability and availability of coverage. *Id.* In his written statement, he points out that a carrier's loss exposure in the Arkansas market could far exceed the amount of premium collected. *Id.* It would be ludicrous for an insurer to take on that risk. *Id.*

Since the hearing, the situation has worsened.[7] On July 21, 2003, ArkansasBusiness.com reported the results of a nursing home survey conducted by the Arkansas Health Care Association. Alicia Stogner, *Insurance Premiums Continue to Rise*, ArkansasBusiness.com, (July 21, 2003) *available at* http:wwwarkansasbusiness.com. The survey showed that 103 out of 225 Arkansas nursing homes cannot afford or obtain liability insurance, due to the high cost of coverage. *Id.* Premiums spiked from $658,796 in 1999 to nearly $14 million in 2002, which is a 2,025.1% increase. *Id.* Medical directors and doctors have left nursing homes that do not have liability coverage, and other such professionals "are reluctant" to

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[7] The long-term care liability insurance pool did not get off the ground due to a lack of participation.

work under the "insurance crisis conditions." *Id.* The situation saps nursing homes' ability to increase direct care to patients. *Id.*

In 2001, nursing home operators and insurance industry representatives said Arkansas was in the midst of a crisis. Nursing homes could not find good liability coverage. What they find they could not afford. The surplus lines carriers still writing this coverage were running out of capacity. Money that should go to patient care was going to cover the high cost of substandard insurance coverage. The homes faced doing business without coverage and potential foreclosure. Nursing home residents would have to find somewhere else to go, but such places may not have room for them. Private pay patient would have to pay increased costs for their care, due to high premiums and slow federal reimbursements. Large verdicts such as the one at issue in the case ultimately bleed over into the pockets of the entire State of Arkansas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, D/B/A RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

vs.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMERICAN HEALTH CARE ASSOCIATION, AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2(b) of this Court, the American Health Care Association (AHCA), American Association of Homes and Services for the Aging (AAHSA), and National Association of Independent Insurers (NAII) move for leave to appear as *amici curiae* and file the accompanying *amicus curiae* brief in support of petitioners. Petitioners have consented to the filing of this brief, but respondent has refused to give consent.[1]

As explained in more detail in the statement of interest in the accompanying brief, AHCA is a private, non-profit federation of affiliated state associations representing approximately two-thirds of this nation's nursing homes. AAHSA is also a non-profit membership association, with 40 affiliated state associations that represent more than 5000 non-profit facilities and organizations providing housing, health care and other services to aging and disabled individuals. NAII is a non-profit property and casualty trade association, representing more than 725 member companies.

AHCA, AAHSA and NAII can offer this Court a unique perspective on the nursing home profession, the nation's critical and growing need for the health care services it provides, and the serious threat to these services posed by excessive punitive damages awards – in particular punitive damages awards that have no relation to (and, in this case, actually exceed) a defendant's net

[1] Petitioners' letter of consent to the filing of this brief has been filed with the Clerk of the Court.

worth. The Court has not yet addressed the necessity of considering a defendant's net worth in determining whether a punitive damages award is excessive and in violation of the Due Process Clause of the Fourteenth Amendment. AHCA, AAHSA and NAII respectfully urge the Court to address this question because, as explained more fully in the accompanying brief, excessive punitive damages awards adversely impact the entire nursing home profession, not just the individual nursing home involved.

Accordingly, AHCA, AAHSA and NAII move for leave to appear as *amici curiae* and file the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The American Health Care Association (AHCA), American Association of Homes and Services for the Aging (AAHSA), and National Association of Independent Insurers (NAII) submit this *amicus curiae* brief in support of the petition for writ of certiorari filed by Advocat, Inc., Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Diversicare Management Services Company (collectively, petitioners).[2] Petitioners seek review of the Arkansas Supreme Court's decision in *Advocat, Inc. v. Sauer*, No. 02-189, 2003 WL 1996087 (May 1, 2003), imposing a $21 million punitive damages award and joint and several liability for that award. As set forth below, *amici* have a profound interest in the punitive damages issues petitioners ask the Court to address.

AHCA is a private, non-profit federation of 51 affiliated state associations representing approximately 12,000 non-profit and proprietary providers of long-term care and more than 1.5 million caregivers. AHCA's representation encompasses about two-thirds of the country's nearly 17,000 nursing homes. AHCA and its members are committed to delivering quality care to our nation's elderly and disabled, and endorse Congress's efforts in the last decade to focus attention on the aging of our population and the increasing need for long-term care.

Since 1987, when Congress enacted the landmark nursing home reforms of the Omnibus Budget Reconciliation

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[2] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no party or their counsel authored, or paid for, this brief in whole or in part.

Act of 1987, P.L. 100-203, nursing homes participating in Medicare and Medicaid programs must meet numerous federal standards governing long-term care, including a requirement that they furnish a level of care that ensures the "highest practicable" state of well-being of each resident. 42 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. Part 483. The vast majority of nursing homes participate in the Medicare and Medicaid programs – indeed these programs cover 80 to 90 percent of our nursing home population – and are therefore subject to these requirements.

Additionally, in 2002, the Department of Health and Human Services (HHS) and Centers for Medicare & Medicaid Services launched the Nursing Home Quality Initiative to identify areas of care that may need improvement, to publicly report quality assessments to assist consumers in making nursing home choices, and to improve patient care outcomes. Preliminary reports indicate the initiative has had a positive influence on the quality of care. The same year, AHCA joined with AAHSA and the Alliance for Quality Nursing Home Care to establish a profession-wide program to support and advance the HHS initiative and to promote continuous quality assurance, resident and family rights, community involvement and financial stewardship.

However, providing quality care depends on a number of factors: clinical expertise, sound facilities, and the teamwork and dedication of a variety of health care professionals and nursing home staff. It also requires financial resources. AHCA has been, and continues to be, a relentless advocate of public policies that promote the funding necessary to deliver quality care.

AAHSA is also a non-profit membership association, with 40 affiliated state associations that represent over 5,600 non-profit facilities and organizations providing housing, health care and other services to more than 1 million aging and disabled individuals. Seventy percent of AAHSA homes and organizations have religious sponsors, including Catholic, Protestant, Jewish and Muslim denominations. Private foundations, fraternal organizations, government agencies, unions and community groups sponsor the other organizations. Many AAHSA members provide nursing home services and community-based services such as home health care, hospice care for those in the last stages of terminal illness, and specialty care for those with Alzheimer's disease and other forms of dementia. Other members are continuing-care retirement communities which provide "continuum of care" health care and housing on one site for the remainder of the residents' lives; residents maintain independence in their own homes for as long as possible through home-based services, but receive skilled nursing home care if needed.

AHCA and AAHSA members, thus, have a profound interest in the punitive damages issues presented by this case. Cases involving the care of our elderly are among the most sensitive in the courts, and during the last decade there has been a dramatic increase in such litigation. During the same period of time, the nursing home profession has also become among the most financially imperiled in the country. Medicare and Medicaid payments are modest, and in most cases do not cover the daily cost of care. Insurance costs have skyrocketed, driven by litigation costs and runaway verdicts like the $78 million jury verdict in this case ($15.025 million in compensatory damages and $63 million in punitive damages). Some

insurers have abandoned the market entirely. Thus, the profit margin of even proprietary providers is razor thin, and bankruptcies have become a problem in this health care sector which provides essential, long-term care to increasing numbers of our aged and infirm.

For non-profit providers, like AAHSA's members, excessive punitive damages awards pose additional, unique risks. Continuing care communities, for example, often hold substantial residential assets, largely financed by the residents, themselves, in addition to nursing home facilities and operations. Thus, an excessive punitive damages award can seriously impact, or even eliminate, an entire residential community. In addition, non-profits are often organized with their endowments held in separate foundations, making the specter of joint and several liability for punitive damages, regardless of actual culpability, a serious concern. Finally, non-profit organizations often hold and use substantial funds for other charitable purposes, which are imperiled by excessive punitive damages awards.

NAII is a non-profit property and casualty trade association, representing more than 725 member companies. As a group, NAII members write every line of insurance for a combined total of $124 billion in annual premiums, representing 31.2 percent of the industry's total premium volume. Members range in size from billion-dollar companies, to multi-line regional groups, to single-state and niche writers. One of NAII's primary purposes is to provide objective cost and loss data to regulators, legislators and state and federal agencies. NAII members also have a vital interest in the costs and consequences of excessive punitive damages awards.

This case graphically illustrates why the Court should now consider the issues petitioners present regarding the need for net worth evidence in determining whether a punitive damages award is excessive and in violation of the Due Process Clause of the Fourteenth Amendment – issues not addressed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). The Arkansas courts refused to consider petitioners' net worth evidence. Yet, that evidence established one petitioner had a $3.8 million *negative* net worth, another had a consolidated net worth of only $269,679 and the third had a net worth of $4.2 million. Thus, even the remitted $26 million award ($5 million compensatory damages, $21 million punitive damages) is grossly excessive. The $21 million punitive damages award, alone, is nearly five times the net worth of the one petitioner with any net worth to speak of. While a punitive damages award can properly punish a defendant, an award that strikes a mortal economic blow, as the remitted award does in this case, falls outside constitutional bounds.

Not only did the Arkansas Supreme Court impose this staggering punitive damages sanction without regard for petitioners' net worth, it went on to justify the result under the kind of company-wide rationale this Court condemned in *Campbell*. The state court seemingly took comfort in the remitted $21 million punitive damages number because one petitioner operates some 86 facilities in the southeastern United States and Canada and, according to the state court, oversees "a major business enterprise." *Advocat, Inc.*, No. 02-189, at 19. But business size is not any kind of measure of net worth, as the proffered evidence of petitioners' net worth confirms.

Furthermore, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Campbell*, 123 S. Ct. at 1523.

On top of all this, the Arkansas Supreme Court *sua sponte* imposed joint and several liability for the remitted $21 million punitive damages award. Not only did this appellate "fact finding" transgress each petitioner's due process rights to notice and an opportunity to be heard (in the trial court, the punitive damages claims were tried separately as to each defendant), but as *Gore* and *Campbell* indicate, due process requires an *individualized* assessment of a defendant's own particular conduct.

Amici fully appreciate there is a jury finding of liability for punitive damages in this case, and they are not before the Court urging that this finding be revisited. The crippling amount of the penalty imposed, however, presents questions of compelling nationwide concern, which the Court should address to complete the task it has undertaken in *Gore* and *Campbell*.

SUMMARY OF ARGUMENT

Excessive punitive damages awards, like the one in this case, have had a catastrophic impact on *all* nursing homes, including those with impeccable records. Nursing homes face unprecedented fiscal challenges simply to provide quality care. Both the demand for and cost to provide skilled nursing home services have increased

significantly. Yet, payments under Medicare and Medicaid, the two programs that provide most of the funding for these services, have remained exceedingly modest, often not covering the cost of daily care.

The additional burden of soaring insurance costs – driven largely by increased litigation costs and astronomical verdicts like the $78 million verdict returned by the jury here – has brought the nursing home profession to a state of financial crisis. Hundreds of providers have either gone bankrupt or simply given up and gone out of business. Those remaining have the barest of profit margins or operate only by the grace of charitable subsidies. In short, every dollar paid out in an excessive punitive damages award, or because of increased operating costs attributable to such awards, is a dollar nursing homes can ill afford to divert from patient care.

Thus, this case presents a compelling context in which to address the punitive damages issues raised by petitioners.

ARGUMENT

A. Nursing Homes Provide Vital Long-Term Care For A Growing Number Of Individuals In Our Society

Nursing homes provide care for nearly 2 million individuals on any given day and more than 3.5 million people over the course of a year. Centers for Medicare & Medicaid Services, *Health Care Industry Market Update: Nursing Facilities* 5 [hereinafter CMS], *at* http://www.cms.hhs.gov/reports/hcimu/hcimu_05202003.pdf (May 20, 2003). While these numbers are large, they are expected to

grow even more dramatically in the coming decades as "baby-boomers" enter their senior years.

Census data indicates that by 2020, the number of individuals over age 85 will increase by nearly 60 percent, and by 2040, by more than 200 percent. Cherie Song, *States Move to Curb Nursing Home Suits: Damages, Right to Sue are Limited*, Nat'l L.J., July 7, 2003, at 1, *available at* LEXIS, News Library, Ntlawj File; *see also Projections of the Total Resident Population by 5-year Age Groups, and Sex with Special Age Categories: Middle Series, 2001 to 2005*, at 3, *at* http://www.census.gov/population/projections/nation/summary/np-t3-b.txt (last visited Aug. 15, 2003) (in 2003, 4.684 million individuals 85 years and over); *Projections of the Total Resident Population by 5-year Age Groups, and Sex with Special Age Categories: Middle Series, 2025 to 2045*, at 2 & 4, *at* http://www.census.gov/population/projections/nation/summary/np-t3-f.txt (last visited Aug. 15, 2003) (in 2030, 8.931 million individuals 85 years and over, and in 2040, 14.284 million).

A commensurate increase is expected in the number of individuals needing nursing home care, with current estimates indicating approximately 5 million individuals will need long-term care by 2030. Population Resource Center, *The Demographics of Aging in America*, *at* http://www.prcdc.org/summaries/aging.html (last visited Aug. 14, 2003).

B. Nursing Homes Face Unprecedented Fiscal Challenges

1. The Vast Majority Of Nursing Home Care Is Paid For By Medicare Or Medicaid

Nursing homes operate on the slimmest of margins that continue to shrink. From the first quarter of 2002 to

the first quarter of 2003, the average profit margin of publicly traded for-profit nursing homes declined from 2.8 percent to 1.1 percent. CMS at 3. By any measure, this is a razor thin margin and one that can scarcely sustain economic vitality in this important sector of our health care industry.

Non-profit nursing homes have fared even worse, due to historically slimmer margins coupled with recent declines in charitable contributions and endowment income. CMS at 3, 11, 22. In New York, for example, nearly half of all non-profit nursing homes lost money in 2001. Samantha Marshall, *Nursing Home Finances Sink Fast; Survey: Bankruptcy Danger Rising as Reimbursements Fall; Cutbacks Beginning*, Crain's N.Y. Bus., Jan. 6, 2003, *available at* LEXIS, News Library, Nybus File.

Frustratingly, nursing homes can do little to increase their income since it is largely fixed by the government through the Medicare and Medicaid programs. Medicare is a federally-funded program that covers 10 to 15 percent of nursing home residents.[3] CMS at 3, 24. Medicaid, a state-operated system, covers the vast majority of nursing home residents – 65 to 70 percent. *Id.*

In 2000, the average Medicaid payment was $115 per day – nearly 8 percent *less* than the amount necessary to cover the daily cost of a resident's care. CMS at 11. In fact, unreimbursed Medicaid nursing care costs for that year were estimated at more than $3.5 billion nationwide. *Id.* at 11. One faith-based nursing home in Wisconsin reported

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[3] Medicare covers the first 100 days of care for residents who are discharged from an acute care hospital after receiving inpatient care for at least three consecutive days. 42 U.S.C. §§ 1395d(a)(2)(A), 1395x(i).

losses of $37.41 per patient per day as a result of inadequate Medicaid reimbursement. Jennie Tunkieicz, *Crisis Looming as County Loses More Nursing Homes*, Milwaukee J. Sentinel, Nov. 30, 2002, *available at* LEXIS, News Library, Milinl File.

In the coming year, the shortfall in Medicaid payments is only expected to get worse as states facing budget deficits forego cost of living adjustments or, worse, reduce existing reimbursement amounts in an attempt to comply with balanced budget laws. CMS at 3, 4, 24. In fact, forecasters predict 37 states will freeze or reduce their Medicaid reimbursements for 2004. *Id.* at 24.

Nor can nursing homes equitably look to the tiny percentage of patients who pay for their own care to make up for stagnant or declining government reimbursements. In fact, this would simply accelerate the depletion of individual assets, speeding the private payor's entrance into and reliance on the Medicaid program. CMS at 23 (many private-pay residents eventually spend down their assets and become Medicaid eligible).

To put all this in graphic perspective here, at the current average Medicaid reimbursement rate, every $1 million in punitive damages awarded against a nursing home equates to more than 8500 bed-days or more than 23 years of Medicaid reimbursement. Thus, the impact of an excessive punitive damages award on a nursing home is likely to be catastrophic.

2. Individuals Entering Nursing Homes Are Sicker And More Infirm Than In The Past, Requiring Greater Care

At the same time nursing home income and profitability have been constrained, the nursing home population

overall has become more infirm, requiring more care. Today, 95 percent of residents need assistance bathing, 55 percent are bladder incontinent, 46 percent are bowel incontinent and 50 percent need assistance eating. OSCAR Data Reports: Patient Characteristics, Activity of Daily Living – Bathing, *at* http://www.ahca.org/research/oscar/rpt_ADL%20Bathing_dec02.pdf (last visited Aug. 15, 2003); Activity of Daily Living – Bladder and Bowel Status, *at* http://www.ahca.org/research/oscar/rpt_MC_bladderbowel_dec02.pdf (last visited Aug. 15, 2003); Activity of Daily Living – Eating, *at* http://www.ahca.org/research/oscar/rpt_ADL%20Eating_dec02.pdf (last visited Aug. 15, 2003).[4]

This change in patient care needs is due in part to longer life spans. *See* CNN.com, *CDC: Americans Living Longer Than Ever*, *at* http://www.cnn.com/2003/HEALTH/03/14/life.expectancy.ap/ (Mar. 14, 2003). The Medicare inpatient hospital prospective payment system also plays a role by encouraging early release of patients from acute care facilities to nursing homes. Thus, nursing homes now receive patients who, in prior years, would have remained at acute care facilities. William J. Warfel, *Nursing Home Litigation – A Case for Reform*, 54 Chartered Prop. & Casualty Ins. J. 233 (Winter 2001), *available at* 2001 WL 19559567 (see section entitled, "Financing Environment for Long-Term Care"); CMS at 7. Assisted living and other care alternatives have also increased in number, providing care for healthier seniors who in the past might have received care in a nursing home. Samantha Marshall,

[4] The Online Survey, Certification and Reporting (OSCAR) data network maintained by the Centers for Medicare and Medicaid Services in cooperation with state long-term care surveying agencies is the most comprehensive source of facility level information on the operations, patient census and regulatory compliance of nursing facilities.

Nursing Home Finances Sink Fast; Survey: Bankruptcy Danger Rising as Reimbursements Fall; Cutbacks Beginning, Crain's N.Y. Bus., Jan. 6, 2003, *available at* LEXIS, News Library, Nybus File.

Accordingly, the need for skilled nursing home staff is more acute than ever. It also comes at a time when there is a chronic shortage of registered nurses and certified nursing assistants. As a result, nursing homes face stiff competition for caregivers. *See generally* Paraprofessional Healthcare Institute, *Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions*, *at* http://www.paraprofessional.org/publications/CLTC_doc_rev1.pdf (Jan. 2003); National Center for Health Workforce Analysis, U.S. Dep't of Health & Human Serv., *Projected Supply, Demand and Shortages of Registered Nurses: 2000-2020*, *at* http://www.ahca.org/research/rnsupply_demand.pdf (July 2002). In addition, the personal characteristics necessary to work effectively in this health care sector – a special compassion and caring for the elderly and disabled – make hiring and retention of staff a particular challenge.

The nursing home profession, thus, faces unprecedented challenges in delivering quality care, making the problem of excessive punitive damages awards a matter of paramount concern.

C. Excessive Punitive Damages Awards Are Crippling Nursing Homes And Diverting Scarce Dollars Away From Patient Care

1. There Has Been A Dramatic Increase In Nursing Home Litigation, Including Excessive Punitive Damages Awards

Since the early 1990's, there has been a steady increase in nursing home litigation. David G. Stevenson &

David M. Studdert, *The Rise of Nursing Home Litigation: Findings From a National Survey of Attorneys*, 22 Health Affairs 219 (March/April 2003) [hereinafter Stevenson & Studdert], *available at* LEXIS, Genmed Library, Hltaff File. The number of lawsuits per 1,000 beds has *tripled* over the past ten years. CMS at 4, 12. Today, nursing home litigation is one of the fastest-growing areas of health care litigation. Stevenson & Studdert at 219. In the first nine months of 2001, alone, or example, 62 percent of the nursing homes in Florida were sued. Stephen Nohlgren, *Nursing Homes on Brink of Crisis*, St. Petersburg Times (Florida), Dec. 21, 2001, at 1B, *available at* LEXIS, News Library, Stpete File.

Nor is the growth in nursing home litigation limited to the sheer number of cases; the size of damages awards has also increased dramatically. In the past decade, awards have tripled in size and now generally exceed twice the amount awarded in a typical medical malpractice claim. CMS at 4, 12; Aon Risk Consultants, *Long Term Care: General Liability and Professional Liability – Actuarial Analysis*, at 3 [hereinafter Aon], *at* http://www.ahca.org/brief/aon_ltcanalysis2003.pdf (Mar. 3, 2003); Stevenson & Studdert at 223.

Punitive damages awards, in particular, have become staggering. *E.g.,* Claims Mgmt. Div. Of XL Reinsurance Am., *Florida Passes Reforms on Nursing Home Liability*, 3 Nursing Home Lit. Rptr. 14 (Aug. 24, 2001), *available at* LEXIS, News Library, Curnws File (reporting $17 million punitive damages award by Florida jury); *Facility, Aide Hit with $9.25 Million Verdict*, Nat'l L.J., Apr. 1, 2002, at B2, *available at* LEXIS, News Library, Ntlawj File (reporting $8.25 million punitive damages award by Texas jury); Philippa Maister, *Soaring Insurance Premiums Crippling*

Area Nursing Homes, Atlanta Bus. Chron., *at* http://atlanta.bizjournals.com/atlanta/stories/2001/04/30/focus7.html (April 30, 2001) (reporting $3.3 million punitive damages award by Georgia jury); *see also* Dave Parks, *Nursing Home to Appeal $7 Million Judgment*, The Birmingham News, Dec. 19, 2001, *available at* LEXIS, News Library, Curnws File (reporting $7 million verdict by Alabama jury).

In fact, *The National Law Journal*'s list of top 100 verdicts nationwide for 2001 and 2002 included two Texas nursing home cases: one in which the jury assessed $310 million in punitive damages, and another in which the verdict against the nursing home totaled $82 million. Cherie Song, *States Move to Curb Nursing Home Suits: Damages, Right to Sue are Limited*, Nat'l L.J., July 7, 2003, at 1, *available at* LEXIS, News Library, Ntlawj File; *see Fuqua v. Horizon/CMS Healthcare Corp.*, No. 4:98-00-CV-1087-Y, 2001 WL 267650 (N.D. Tex. Feb. 14, 2001).

While *amici* appreciate that punitive damages are an important tool in our civil law, there are – and must be – reasoned limits to the toll a jury can exact. In this sector of our health care system punitive damages awards are, quite frankly, out of control.

2. Spiraling Litigation Costs And Excessive Verdicts Have Substantially Contributed To The Current Cost-And-Availability Crisis In Liability Insurance For All Nursing Homes

The tide of litigation against nursing homes, and particularly excessive punitive damages awards, has burdened the entire profession with skyrocketing insurance costs for which there are simply no resources to pay.

In a majority of states, some types of punitive damages are insurable, so excessive punitive damages awards directly affect insurance reserves. *See generally* Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 Bus. Law. 283, 285 (1999).

Even in the absence of a claim against an insured, the surge in nursing home litigation and reported verdicts have prompted insurers to raise premiums to protect against unknown and unpredictable future losses. CMS at 13; William J. Warfel, *Nursing Home Litigation – A Case for Reform*, 54 Chartered Prop. & Casualty Ins. J. 233 (Winter 2001), *available at* 2001 WL 19559567 (see section entitled, "Nursing Home Liability Insurance Crisis," stating that escalating loss costs have caused escalating insurance prices). Indeed, the mere potential of phenomenal punitive damages awards has fueled litigation, further driving up litigation costs and the cost of insurance. *Id.* (see section entitled, "Conclusion," stating that awards create a lottery atmosphere among potential plaintiffs).

Thus, excessive punitive damages awards have contributed to the increase in insurance costs for *all* nursing homes, both for profit and non-profit, and regardless of their good records and their quality care. Claims Mgmt. Div. Of XL Reinsurance Am., *Florida Passes Reforms on Nursing Home Liability*, 3 Nursing Home Lit. Rptr. 14 (Aug. 24, 2001), *available at* LEXIS, News Library, Curnws File; Kendall Anderson, *Insurance Premiums Blamed for Nursing Home Closure*, Dallas Morning News, Aug. 12, 2002, *available at* LEXIS, News Library, Dalnws File (non-profit nursing home faced fivefold increase in annual premium despite no major lawsuits or settlements); Diane Levick, *New Liability Headaches for Caregivers: State Nursing Homes Face Steep Increases for*

Insurance, The Hartford Courant (Conn.), Aug. 31, 2001, at A1, *available at* 2001 WL 25324122 (rates are skyrocketing for homes without claims).

The impact of excessive verdicts on insurance costs even crosses state lines. Kristina Stefanova, *Suits Boost Nursing Homes' Premiums*, Wash. Times, Sept. 4, 2001, at B6, *available at* 2001 WL 4161132 (even though few lawsuits in Virginia and Maryland, rates have risen dramatically because insurers spread costs to all insureds regardless of location); Terrance J. Shanahan, *Statutory Limits on Punitive Damages in Nursing Home Negligence Tort Actions: Preventing the Collapse of the Private Nursing Home*, 4 J. Health Care L. & Pol'y 373, 384 (2001), *available at* LEXIS, Lawrev Library, Jhclp File ("Given the comparative paucity of nursing home liability insurers, it appears that the runaway damage awards in some states . . . are raising the costs for nursing homes nationwide. . . ."); Dale Wetzel, *North Dakota: Nursing Homes Struggle with Rising Costs; Southern Troubles Raise Rates*, Grand Fork Herald (N.D.), Sep. 30, 2002, *available at* 2002 WL 22566438 (although few lawsuits in North Dakota, nursing homes face sharply higher insurance rates); Diane Levick, *New Liability Headaches for Caregivers: State Nursing Homes Face Steep Increases for Insurance*, The Hartford Courant (Conn.), Aug. 31, 2001, at A1, *available at* 2001 WL 25324122 (rates doubling and tripling in Connecticut even though the state has a more restrained legal climate than other states).

Accordingly, nearly unimaginable rate increases in nursing home insurance have been reported across the country. A group of North Carolina and Virginia nursing homes reported a 434 percent premium increase in one year, followed by an 85 percent increase the next. Marc

Barnes, *Insurance Hikes Threaten Nursing Homes, at* http://www.bizjournals.com/triad/stories/2002/02/18/story1.html (Feb. 18, 2002). In Florida, the per-bed price of liability insurance jumped from $111 in 2000 to $1504 in 2001, with a then-anticipated increase to $2050 in 2002. Jim Saunders, *Nursing Home Insurers Cautious; Facilities Face Jan. 1 Deadline for Liability*, The Florida Times-Union, Dec. 17, 2001, at B1, *available at* LEXIS, News Library, Flatun File.

Indeed, the national average for insurance costs increased from $240 per occupied bed in 1995 to $2360 in 2001 – a ten-fold increase – and nursing homes often receive reduced coverage even at these higher rates.[5] Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Affairs, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 13, *at* http://aspe.hhs.gov/daltcp/reports/litrefm.pdf (July 24, 2002); Aon at 4.

Moreover, finding coverage – at any price – has become difficult. Given the tidal wave of litigation and spate of excessive awards, one insurer after another has pulled out of the market altogether. Leslie Werstein Hann, *Driven Out*, 100 Best's Review 84 (Mar. 1, 2000), *available at* 2000 WL 22630136; CMS at 13 (in Texas, between 1996 and 2002, insurance providers dropped from 8 to 2; in Florida, there are no state-licensed providers).

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[5] Thus, the impact on insurance has been two-fold: substantially increased rates to maintain coverage or more modest rate increases but reduced coverage.

The result is "[a] price/availability problem with respect to nursing home liability insurance" of "crisis proportions in many states in the U.S." William J. Warfel, *Nursing Home Litigation – A Case for Reform*, 54 Chartered Prop. & Casualty Ins. J. 233 (Winter 2001), *available at* 2001 WL 19559567; *cf.* CMS at 13.

3. The Consequences For The Entire Nursing Home Profession Have Been Catastrophic

Combined with the constraints on income and increased costs of caring for a more infirm nursing home population, the staggering increase in insurance costs and exposure to excessive punitive damages awards has pushed the nursing home profession to the financial brink.

Many nursing homes have been forced into bankruptcy. CMS at 13. Since the beginning of this year, alone, three multi-facility providers have filed for bankruptcy, including the twelfth largest provider, which had operated nearly 100 skilled nursing facilities in 19 states. *Id.* at 20, 21; Centennial Healthcare website, *at* http://www.centennialhc.com/facilities.htm (last visited Aug. 12, 2003). These bankruptcies come on the heels of the 1999 to 2000 period during which 1,651 nursing homes sought bankruptcy protection (Leslie Werstein Hann, *Driven Out*, 100 Best's Review 84 (Mar. 1, 2000), *available at* 2000 WL 22630136), and five of the top eight nursing home companies filed for protection from creditors (CMS at 20, 21). Two of these top eight companies recently emerged from bankruptcy, but continue to struggle to stay solvent. *Id.* at 20

Other nursing homes have simply closed, concluding the business is no longer sustainable. In Florida, for example, spiraling insurance costs prompted one home to close, even

though it ranked 51st out of 668 homes in the state in terms of quality. Reuters Health, *Legal Liability Costs Surge for US Nursing Homes*, *at* http://yourhealth.stlukesonline.org/healthnews/reuters/newsstory0314200336.htm (Mar. 14, 2003). Similar concerns motivated the closure of faith-based, non-profit long-term care centers across the state of Texas. Kendall Anderson, *Insurance Premiums Blamed for Nursing Home Closure*, Dallas Morning News, Aug. 12, 2002, *available at* LEXIS, News Library, Dalnws File.

As one lawmaker observed, nursing homes are being "'sued out of existence.'" Cherie Song, *States Move to Curb Nursing Home Suits: Damages, Right to Sue are Limited*, Nat'l L.J., July 7, 2003, at 1, *available at* LEXIS, News Library, Ntlawj File.

The instant case is one more example. Even the remitted $21 million punitive damages award is more than any of the petitioners can begin to pay. It is nearly five times the net worth of the only petitioner with any significant net worth. And petitioners were handed this economic death sentence with no consideration at all of their net worth, individually or collectively. This transgresses both the purpose and constitutional bounds of punitive damages – to punish, not destroy.

Furthermore, the Arkansas Supreme Court seems to have justified its $21 million stultifying sanction as an indictment of petitioners' multi-state business. Not only is there no evidence discussed by the Arkansas court in its decision that could support a sweeping condemnation of petitioners' other facilities, but this is exactly the far-flung, "industry-wide" indictment the Court condemned in *Campbell*. 123 S. Ct. at 1521-23. Finally, the Arkansas appellate court found petitioners "jointly and severally"

liable for the $21 million remitted punitive damages award – even though no such case was ever put on or tried in the trial court and even though punishment must be meted out on an individualized basis under *Gore* and *Campbell*.

CONCLUSION

The Court has not yet spoken on net worth as a necessary consideration in drawing the line between fair and reasoned punishment, which is constitutionally permissible, and arbitrary economic forfeiture, which is prohibited by the Due Process Clause of the Fourteenth Amendment. This case presents a compelling context in which to do so, and *amici* urge the Court to grant the petition for certiorari and resolve these pressing punitive damages questions of national significance.

DATED: August 28, 2003.

Respectfully submitted,

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(6)

IN THE SUPREME COURT OF THE UNITED STATES

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY — PETITIONERS

v. No. 03-160

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER, — RESPONDENT

RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF AMERICAN HEALTH CARE ASSOCIATION, AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Lon C. Sauer, individually, and as administrator of the Estate of Margaretha Sauer (the "Sauer Estate"), opposes the motion for leave to file brief of amicus curiae American Health Care Association, American Association of Homes and Services for the Aging, and National Association of Independent Insurers (the "Industry Groups") for the reasons stated hereinafter.

Rule 37.1 of the Rules of this Court provides that an amicus curiae brief that brings attention of the Court to a relevant matter not already brought to its attention by the parties may be of considerable help to the Court, but an amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored. For the reasons explained hereinafter, the proposed amicus brief of the Industry Groups does not serve the purpose of an amicus brief, and its filing should not be accepted.

The present issue is whether to issue a writ of certiorari to the Supreme Court of Arkansas to review that court's application of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). The proposed amicus brief does not address any of the reasons that this Court considers in granting or denying

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certiorari. The proposed amicus brief does not address any legal issue. It does not point to any important federal question that this Court should resolve. The proposed amicus brief does not point to any conflict between the decision of the Supreme Court of Arkansas in this case and the decision of another state court of last resort or of a United States Court of Appeals. The proposed amicus brief does not claim that the Supreme Court of Arkansas has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Instead, the proposed amicus brief is devoted entirely to judicial lobbying of the sort described in Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823 (1999). The proposed amicus brief lobbies the Court "by marshaling policy arguments and factual claims not supported by the record." *Id.* at 829. The non-record "facts" described in the proposed amicus brief consist primarily of references to newspapers and to the Industry Groups' own studies posted at their own websites. Of the 31 authorities cited in the proposed amicus brief, 15 are articles from newspapers or magazines, 9 are references to industry sources, 5 are references to government websites (including 3 demographic studies), and 2 are references to law journals. It does not appear that any of the authorities is a publication in a peer review journal.

Professors Rustad and Koenig have described this kind of amicus brief:

> The most common method of introducing social science evidence to the Court is through "non-record evidence" in amicus curiae briefs. At trial, when statistical and social science evidence is employed, "it will be the subject of expert testimony and knowledgeable cross-examination from both sides." Amicus briefs are not subject to the same standards. The poorly controlled use of social science data by amici curiae may not only be prejudicial to the parties, but inimical to sound judicial decision-making.

Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (Nov. 1993) (footnotes omitted). The proposed amicus brief of the Industry Groups does not rise even to the level of the "junk social science" described by Professors Rustad and Koenig. It is not social science at all. Not a single article from a recognized social science journal is cited anywhere in the proposed amicus brief. The import of the proposed amicus brief supposedly is to show that a crisis exists for nursing homes and for insurers due to the impact of large punitive damage awards, but the proposed amicus brief does not cite a single study having to do with punitive damage awards. It cites studies relating to the number of lawsuits and the size of claims made in those lawsuits, but it does not cite any study pertaining to punitive damage awards paid by nursing homes or their insurers. Anecdotal references are made to a handful of newspaper articles reporting on jury verdicts awarding punitive damages, but it is impossible to tell from the amicus brief whether the verdicts withstood post-trial motions or appeals, or what happened to them.

Presumably, the intent is to leave the reader with the *feeling* that something amiss has happened in the country; but the proposed amicus brief provides no rational basis for concluding that, indeed, the judicial system is not functioning properly around the country in regard to nursing home litigation, nor that nursing homes and their insurers face a crisis due to punitive damage awards. The amicus brief is an appeal to sympathy and prejudice, not to evidence and logic, and certainly not to law.

Such an appeal may be appropriate in the political process, but it is wholly out of place in court. The proposed amicus brief is but another example of groups who "believe that their appropriate role involves lobbying the Court based on undocumented interest group assertions

and poor quality social science evidence." Morriss, 7 WM. & MARY BILL RTS. J. at 908. As Professor Morriss notes, the "rise of the amici reflects the overall decline in legal argument." *Id.* at 910.

"The judiciary is subject to a determined campaign by lobbyists to convince them that tort reform of punitive damages is vital." Rustad and Koenig, 72 N.C. L. REV. at 141. Yet, the truth is that every imperical study of the punitive damages question has reached conclusions that fail to support the claim that punitive damages have grown dramatically in both frequency and size. *Id.* at 130.

With all due respect, it is beneath the dignity of this Court to permit lobbying efforts of the sort that is proposed by the Industry Groups. We do not suggest that lobbying, itself, is improper. We do say, however, that lobbying should be addressed to the legislative and executive branches, not to the judicial branch.

CONCLUSION

For these reasons, the Sauer Estate respectfully requests that the Motion for Leave to File Brief of Amicus Curiae American Health Care Association, American Association of Homes and Services for the Aging, and National Association of Independent Insurers be denied.

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CERTIFICATE OF SERVICE

On this 5th day of September, 2003, a copy of the foregoing was served upon the following:

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